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Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: DONALD J. TRUMP CASINO SECURITIES LITIGATION – TAJ MAHAL LITIGATION.

JOANNE GOLLOMP, SUSAN CAGAN, ERIC CAGAN, DAVID E. DOUGHERTY, JEAN CURZIO, ROBERT and HELEN KLOSS, FRED GLOSSNER, HERMAN KRANGEL, SIDNEY KAUFMAN, JEROME SCHWARTZ, DINO DEL ZOTTO, ALEXANDER L. CHARNIS, and DOROTHY ARKELL, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

DONALD J. TRUMP, ROBERT S. TRUMP, HARVEY S. FREEMAN, THE TRUMP ORGANIZATION, INC., TRUMP TAJ MAHAL FUNDING, INC., TRUMP TAJ MAHAL, INC., TRUMP TAJ MAHAL ASSOCIATES LIMITED PARTNERSHIP, and MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The prospectus for a $675 million bond offering contained the following statement required by the Securities and Exchange Commission ("SEC"): "The Partnership believes that funds generated from the operation of the Taj Mahal will be sufficient to cover all of its debt service (interest and principal)." The prospectus also sets forth various cautionary statements. The Court of Appeals ruled that "the accompanying warnings and cautionary language served to negate any potentially misleading effect that the prospectus' statement about the Partnership's belief in its ability to repay the bonds would have on a reasonable investor." (App., infra, A-53; 7 F.3d at 373.)

The first question presented is whether the Court of Appeals erred in ruling, as a matter of law on a Fed. R. Civ. P. 12(b)(6) motion to dismiss, that the issuer's statement regarding ability to repay was immaterial, when the SEC requires that such a statement appear in a high-yield bond offering prospectus.

The second question presented is whether, in light of a conflict between the Third and the Sixth Circuit Courts of Appeals, this Court's ruling in Virginia Bankshares v. Sandberg, 501 U.S. ___, 111 S. Ct. 2749, 115 L. Ed. 2d 929 (1991), permits dismissal on a motion to dismiss under the so-called "bespeaks caution" doctrine.

LIST OF PARTIES PURSUANT TO RULE 14.1(b)

All parties to the proceedings below appear in the caption.

LIST OF AFFILIATED ENTITIES PURSUANT TO RULE 29.1

Inapplicable as each of the petitioners is an individual.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, A-1) affirming the dismissal of the complaint is reported at 7 F.3d 357. The opinion and order of the United States District Court for the District of New Jersey (App., infra, A-73) dismissing the complaint is reported at 793 F. Supp. 543.

JURISDICTION

The judgment of the Court of Appeals was entered on October 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE REGULATION INVOLVED

Item 303(a)(1) of Regulation S-K ("Management's Discussion and Analysis of Financial Condition and Results of Operations" -- 17 C.F.R. § 229.303(a)(1)) provides in pertinent part as follows:

> (a) *Full fiscal years.* Discuss registrant's financial condition, changes in financial condition and results of operations. The discussion shall provide information as specified in paragraphs (a)(1), (2) and (3) with respect to liquidity, capital resources and results of operations and also shall provide such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Discussions of liquidity and capital resources may be combined whenever the two topics are interrelated. . . .
>
> (1) *Liquidity.* Identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. If a material

> deficiency is identified, indicate the course of action that the registrant has taken or proposes to take to remedy the deficiency. Also identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

Instruction 5 to Item 303(a) provides in pertinent part as follows:

> The term "liquidity" as used in this item refers to the ability of an enterprise to generate adequate amounts of cash to meet the enterprise's needs for cash. Except where it is otherwise clear from the discussion, the registrant shall indicate those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition. Liquidity generally shall be discussed on both a long-term and short-term basis. The issue of liquidity shall be discussed in the context of the registrant's own business or businesses. . . .

STATEMENT

Respondent Trump Taj Mahal Funding, Inc. ("Funding") issued $675,000,000 principal amount of 14% first mortgage bonds to the public, pursuant to its

prospectus dated November 9, 1988.[1] (App., infra, A-11; 7 F.3d at 364.) Petitioners are purchasers of the bonds.

Soon after their issuance, it became apparent that Funding would default on its obligation to pay interest on the bonds. Several complaints on behalf of bondholders were filed. All were consolidated for pre-trial proceedings in the District of New Jersey by the Judicial Panel on Multidistrict Litigation. The

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1. All of the proceeds of the offering were provided to respondent Trump Taj Mahal Associates Limited Partnership (the "Partnership") for use in the acquisition, construction and opening of the Trump Taj Mahal Casino and Hotel (the "Taj Mahal"), a casino/hotel in Atlantic City, New Jersey. The Partnership guaranteed payment of the bonds. The offering of the bonds to the public was underwritten by respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"). Liability of the remaining respondents - Donald J. Trump, Robert S. Trump, Harvey S. Freeman, The Trump Organization, Inc., and Trump Taj Mahal, Inc. - is predicated primarily upon control over Funding and the Partnership and/or execution of the registration statement of which the prospectus was a part.

consolidated amended complaint alleged violations of Sections 11 and 12(2) of the Securities Act of 1933, as amended (15 U.S.C. §§ 77k and 77l(2)), Section 10(b) of the Securities Exchange Act of 1934, as amended (15 U.S.C. § 78j(b)), Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5), and the common law.

The "Management's Discussion and Analysis of Financial Condition and Results of Operations" section of the prospectus (commonly referred to as the "MD&A"), contained the following statement:

> The Partnership believes that funds generated from the operation of the Taj Mahal will be sufficient to cover all of its debt service (interest and principal).

As set forth by the Court of Appeals, petitioners' "principal claim is that the defendants had neither an honest belief in nor a reasonable basis

for . . . [the above-quoted] statement in the MD&A section of the prospectus . . . ." (App., infra, A-21; 7 F.3d at 366.)

The Court of Appeals' reading of the prospectus in its entirety resulted in its concluding "that the Taj Mahal bonds represented a rather risky, speculative investment which might yield a high rate of return, but which alternatively might result in no return or even a loss." (App., infra, A-35-6; 7 F.3d at 369.) Petitioners agree with the Court of Appeals' characterization of the bonds as speculative. That factor, however, did not deprive petitioners of a cause of action. The securities laws do not apply only to blue chip securities. On the contrary, as shown below, the SEC is especially concerned with the quality of MD&A

disclosure in prospectuses offering high-yield debt securities.

The parties reached a settlement-in-principle of this action. The settlement was memorialized in a "Memorandum of Understanding" which was subject to "confirmatory discovery." (App., infra, A-76; 793 F. Supp. at 546.)

As a result of the confirmatory discovery, petitioners abandoned the settlement. The principal reason for the abandonment of the settlement was discovery relating to a document prepared by the accounting firm of Laventhol and Horwath, in September 1987, for Resorts International, Inc. ("Resorts"), the original developer of the Taj Mahal project (the "Laventhol

Report").[2] ((App., infra, A-174; 793 F. Supp. at 566-67.) The Laventhol Report, in petitioners' view, is compelling evidence that respondents lacked an honest belief in, or a reasonable basis for, opining that the Taj Mahal project would be able to pay the required debt service.

The prospectus prominently referred to and described the contents of an appraisal known as the "AGI Report," which document the District Court identified as the basis for respondents' "belief" that the Taj Mahal project could generate sufficient funds to cover

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2. The Laventhol Report, in addition to being produced by respondent Merrill Lynch, was certainly known to the other respondents. In September 1987, when the Laventhol Report was delivered to Resorts, respondent Donald J. Trump was Resort's Chairman of the Board of Directors, respondent Robert S. Trump was Resorts' Vice Chairman of the Board of Directors, and respondent Harvey I. Freeman was a director of Resorts. The Partnership acquired the Taj Mahal from Resorts pursuant to an asset purchase agreement dated May 27, 1988.

debt service (App., infra, A-125; 793 F. Supp. at 556), yet the prospectus failed even to mention the existence of the Laventhol Report or describe its conclusions. Respondents' concealment of the Laventhol Report is remarkable in that any reasonable prospective purchaser of the bonds would have found the Laventhol Report inherently more reliable than the AGI Report. The Laventhol Report was prepared for Resorts for the purpose of "mapping corporate strategy" (App., infra, A-180; 793 F. Supp. at 568). By contrast, according to the prospectus, the AGI Report was obtained "in connection with the acquisition of the Property and the offering of the Bonds." [Emphasis added.] In other words, the Laventhol Report was an internal planning document, whereas the AGI Report was a

selling document prepared for distribution to potential investors.

As the District Court noted,

> The Laventhol Report's projections of future income and cash flow for the Taj Mahal differ markedly from the AGI Report projections included in the prospectus. Indeed, the Laventhol Report projections, as it has turned out, mirror more accurately the actual economic performance of the Taj.

(App., infra, A-175; 793 F. Supp. at 567. [Emphasis added.])

Soon after petitioners abandoned the settlement, respondents moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The District Court, adopting what has become known as the "bespeaks caution" doctrine, granted respondents' motions. The District Court embraced what was, in effect, a per se rule:

> The "bespeaks caution" analysis subsumes the misrepresentation analysis. No reasonable inference can be drawn in favor of a plaintiff that a document or

> statement which bespeaks caution as to future forecasts contains actionable misrepresentations.

(App., infra, A-110; 793 F. Supp. at 553.) The Court of Appeals affirmed, opining that:

> "bespeaks caution" is essentially shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law.

(App., infra, A-9; 7 F.3d at 364.) Based upon its analysis of the prospectus, the Court of Appeals held that:

> the plaintiffs' complaint does not falter just because it alleges that the defendants made a misrepresentation with their statement that they <u>believed</u> they would be able to repay the principal and interest on the bonds. Rather, the complaint cannot survive a motion to dismiss because ultimately it does not sufficiently allege that the defendants made a <u>material</u> misrepresentation.

(App., infra, A-31-32; 7 F.3d at 369. [Emphasis in original.])

Specifically, the Court of Appeals ruled:

> [T]he accompanying warnings and cautionary language served to negate any potentially misleading effect that the prospectus' statement about the Partnership's belief in its ability to repay the bonds would have on a reasonable investor.

(App., infra, A-53; 7 F.3d at 373.)

Neither the Court of Appeals nor the District Court explained how management's belief as to the ability to pay interest and repay principal could ever be deemed immaterial, as a matter of law, to purchasers of debt securities. If debt service coverage is immaterial to a bondholder, what would be material? Nor did the Court of Appeals explain which cautionary language addressed the question of the reasonableness of the Partnership's

belief. Both the Court of Appeals and the District Court also failed to explain how their rulings can possibly be harmonized with the disclosure specifically required by the Securities and Exchange Commission ("SEC") in the pivotal MD&A section of a prospectus for the offering of bonds.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' ruling contravenes longstanding SEC practice under Item 303 of Regulation S-K. The Court of Appeals ruled immaterial a disclosure -- management's belief regarding whether cash flow will cover interest and principal on the bonds -- that the SEC considers of cardinal importance in connection with the issuance of high-yield debt securities. The Court of Appeals' interference with the regulatory process is unwarranted,

unnecessary, and counterproductive. If the decision below stands, the practical effect will be that purchasers of high-yield instruments will be afforded less protection under the securities laws than purchasers of blue chip debt instruments.[3]

Moreover, by its ruling, the Court of Appeals placed itself in conflict with the Court of Appeals for the Sixth Circuit. Relying on this Court's decision in Virginia Bankshares, the Court of Appeals applied the so-called "bespeaks caution" doctrine to affirm a dismissal on a motion to dismiss. The Sixth Circuit Court of Appeals, in Mayer v. Mylod, 988 F.2d 635 (1993), expressly rejected this approach, also relying on

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3. Because the issues involved in this case bear critically on SEC regulation and practice, petitioners respectfully suggest that the Court solicit the Government's views on this petition.

Virginia Bankshares. A conflict therefore exists between these two Courts of Appeals.

I. The Decision Below Conflicts With The SEC's Practice under Regulation S-K, Item 303; This Court's Decision in Virginia Bankshares; and the Realities of the Market for Debt Securities

The first question presented by this petition involves the materiality of a statement in a bond prospectus regarding management's belief about the ability of the enterprise to generate sufficient cash flow to pay interest and principal as they come due. SEC practice, this Court's ruling in Virginia Bankshares v. Sandberg, 501 U.S. ___, 111 S. Ct. 2749, 115 L. Ed. 2d 929 (1991), and the efficient functioning of the debt securities markets require reversal of the Court of Appeals.

This petition presents a direct conflict between the Court of Appeals and the SEC.[4] The Court of Appeals ruled, as a matter of law, that the statement regarding ability to repay was immaterial. The SEC, on the other hand, has established a regulatory scheme that requires the very disclosure that the Court of Appeals found immaterial. Based on the SEC's extensive experience in the area of debt offerings, the SEC has required a high-yield bond issuer to state in the prospectus the issuer's reasonable belief regarding whether the enterprise will generate sufficient cash flow to cover debt payments.

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4. See Anderson Bros. Ford v. Valencia, 452 U.S. 205, 211-13 (1981) (Federal Reserve Board interpreted regulation differently from all Courts of Appeals to have considered the issue); First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (certiorari granted in part due to disagreement between Board and Courts of Appeals).

The Court of Appeals' ruling totally disrupts the SEC's regulatory scheme, and certiorari therefore should be granted in order for this Court to resolve which of these two opposing views of the securities laws should prevail: the Court of Appeals' or the SEC's.

The prospectus was subject to the requirements of Regulation S-K, 17 C.F.R. § 229.1, et seq., promulgated by the SEC. In accordance with Item 303 of Regulation S-K, 17 C.F.R. § 229.303, the prospectus was required to include the MD&A section. It was in the MD&A section that respondents made the critical statement -- because the SEC required them to -- that management believed the Taj Mahal would be able to service and pay off its debt.

The MD&A section is the centerpiece of the SEC's disclosure regimen:

> Often the most important textual disclosure item in Regulation S-K is Item 303, which requires management to discuss a registrant's financial condition and results of operations, specifically describing known trends or uncertainties concerning liquidity, capital resources, and income . . . .
>
> * * *
>
> The Commission staff has particularly emphasized the need for disclosures concerning liquidity and capital resources. Instruction 5 to Item 303(a) defines liquidity as "the ability of an enterprise to generate adequate amounts of cash to meet the enterprise's needs for cash." The registrant is required to "[i]dentify any known trends or any known demands, commitments, events or uncertainties that will result in . . . the registrant's liquidity increasing or decreasing in any material way."

II Louis Loss & Joel Seligman, Securities Regulation 668, 671 (3d ed.

1989). [Emphasis added; Citation omitted.][5]

Applying these principles, the SEC staff has long followed a policy of requiring high-yield bond issuers to state, in the MD&A section of the prospectus, management's belief as to whether cash flow will be sufficient to cover interest and principal. Christian S. Herzeca, "How Much Disclosure Is Enough? Evolving Law Raises Questions," The New York Law Journal, December 6, 1993, p. 10. In the absence of such a

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5. Indeed, the MD&A section "has developed into the single most important disclosure provision in SEC filings and other disclosure documents." Note, The Duty to Disclose Forward-Looking Information: A Look at the Future of MD&A, 61 Fordham L. Rev. S-245, S-254 (1993), citing Ted J. Fiflis, Financial Statements, the Management's Discussion and Analysis, and the Accounting Provisions of the Foreign Corrupt Practices Act, C533 A.L.I.-A.B.A. 751 (June 18, 1990), available on Westlaw, JRL database. [Footnote omitted.]

statement, the SEC will not allow the prospectus to become effective. Id.

As Herzeca states, in analyzing the great impact of the Court of Appeals' decision below on practitioners in the area of drafting bond prospectuses:

> In its comment letter to issuers of high-yield debt in registration, the staff of the division of corporation finance of the Securities and Exchange Commission regularly requires the issuer to disclose its belief that it will generate sufficient funds to pay debt service on the debt being offered for sale under the registration statement.
>
> Therefore, this forward-looking disclosure of an issuer's ability to service its debt seized upon by the plaintiffs in In re Trump is a disclosure that is endemic to public offerings of high-yield debt.

Id. [Emphasis added; footnote omitted.].[6]

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6. In a footnote, Herzeca pointed out that "[i]n the case of the Taj Mahal prospectus, the issuer anticipated the staff's comment" by including in the preliminary prospectus a statement of management's belief regarding ability to pay debt service. Id.

This simple fact requires reversal of the Court of Appeals' ruling. The Court of Appeals ruled, as a matter of law, that the statement was not material. SEC practice says it is.

The requirement that a bond prospectus state management's belief regarding coverage of debt service stems from the extreme importance the SEC - as well as this Court - attaches to the disclosure of management's "beliefs." As the SEC has explained: "MD&A is intended to give the investor an opportunity to look at the company through the eyes of management." In re Caterpillar, Inc., SEC Exchange Act Release No. 30532, 1992 SEC Lexis 786 (March 31, 1992), quoting Release No. 6771 (April 24, 1987). [Emphasis

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at n.5.

added.] The reason for this required disclosure is obvious: as this Court observed in Virginia Bankshares,

> Shareholders know that directors usually have knowledge and expertness far exceeding the normal investor's resources, and the directors' perceived superiority is magnified even further by the common knowledge that state law customarily obliges them to exercise their judgment in the shareholders' interest.

115 L. Ed. 2d at 944. [Emphasis added.]

Common sense alone suggests that an investor would attach significant importance to the views of management about a proposed venture's likelihood of success. This is particularly the case where the investor has purchased debt, not equity. Indeed, as one commentator asserted:

> There can be no greater significance to a Taj Mahal investor than the Taj Mahal's ability to pay debt service on its bonds . . . .

Herzeca, supra, at p. 10. In discussing the securities markets' appraisal of offerings like this one, another commentator noted:

> The Trump Casino court [of appeals] paid no attention to the important role that the challenged statement played in making the transaction possible, nor to whether the issuer had any reasonable basis for making the statement.

Geoffrey W. Parnass, "Value of Detailed Disclaimers in a Securities Prospectus," The New York Law Journal, December 9, 1993, p. 4.

If the statement on management's belief played an "important role" in making the bond offering "possible," as Parnass concludes, then how could the statement possibly be immaterial as a matter of law?[7]

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7. In Virginia Bankshares, the Court noted that the mere falsity of a statement about management's belief, standing alone, would not be sufficient to establish liability for securities fraud, because sufficient disclosure about the underlying facts could

The SEC's practice under Item 303 confirms the importance of management's belief regarding debt service coverage. That practice carries the full weight of the interpretation of a statute by the agency charged with its enforcement. Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984); see also City Capital Assoc., L.P. v. Interco, Inc., 860 F.2d 60, 64 (3d Cir. 1988) (courts should defer to the SEC's interpretation of securities statutes and regulations); Zeller v. Bogue Elec. Mfg. Corp., 476 F.2d 795, 800 (2d Cir.), cert. denied, 414 U.S. 908 (1973) (same).

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conceivably deprive the false statement about management's belief of any materiality. 111 S. Ct. at 2761. Here, however, we do not have just any statement about management's belief: we have a statement required by the SEC. Petitioners submit that the SEC's determination that management's belief must be in the offering document precludes a court's determination that, as a matter of law, the statement is immaterial.

The Court of Appeals' dismissal of the SEC's requirement as immaterial is made all the more troubling by this Court's instruction on the appropriate procedure to be followed in determining materiality. In TSC Indus. v. Northway, 426 U.S. 438 (1976), the case defining the concept, this Court mandated extreme care even on a motion for summary judgment -- filed after full discovery on the merits:

> In considering whether summary judgment on the issue [of materiality] is appropriate, we must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.

426 U.S. at 450. [Footnotes omitted.]

Similarly, and specifically with respect to forward-looking statements, the SEC has promulgated Rule 175, 17 C.F.R. § 230.175, which creates a safe harbor for projections. That Rule provides that a forward-looking statement can be actionable if "made or reaffirmed without a reasonable basis or [if it] was disclosed other than in good faith." Id. But the standard imposed by the SEC in this Rule is "by its very nature, a fact-based inquiry not easily invoked to terminate securities fraud claims on motions to dismiss or for summary judgment." Dennis J. Block and Jonathan M. Hoff, "Court Defines Scope of Bespeaks Caution Doctrine," The New York Law Journal, November 18, 1993, at p. 5.

In the face of these principles, the decision of the Court of Appeals

simply ignored SEC practice requiring a statement of management's belief about the adequacy of projected cash flow, Virginia Bankshares' teachings regarding the actionability of false or baseless statements of belief, and the critical importance the market attaches to whether management believes that operations will cover debt service.

II. In the Wake of this Court's Decisions in Basic Inc. v. Levinson and Virginia Bankshares, the Courts of Appeals are Deeply Fractured on the Proper Application of the "Bespeaks Caution" Doctrine

In Basic Inc. v. Levinson, 485 U.S. 244 (1988), this Court expressly reserved the question of the appropriate method of determining the materiality of forward-looking information, stating "[w]e do not address here any other kinds of contingent or speculative information" than the merger negotiations with which that case was

concerned, "such as earnings forecasts or projections." 485 U.S. at 232 n.9. In the wake of this statement, and this Court's subsequent treatment of soft information in Virginia Bankshares, the Courts of Appeals have fractured badly on how to regulate the disclosure of forward-looking statements, and particularly on the use of the "bespeaks caution" doctrine to govern such information.

Most immediately relevant is the division between the Third and Sixth Circuits on the question whether the bespeaks caution doctrine may be applied at all on a motion to dismiss: in the decision below the Third Circuit said "yes." (App., infra, p. A-42-53; 7 F.3d at 371-73.) The Sixth Circuit, in Mayer v. Mylod, 988 F.2d 635 (1993), said "no."

Both courts, however, base their results on this Court's decision in Virginia Bankshares. In Mayer, the Sixth Circuit held:

> the central point of Sinay [v. Lamson & Sessions, Co., 948 F.2d 1037, 1040 (6th Cir. 1991)], that a claim is insufficient as a matter of law if optimistic opinions are coupled with cautionary statements, partially conflicts with Virginia Bankshares because Virginia Bankshares contemplates a weighing of the true with the untrue statements in an announcement for liability to result.
>
> In light of Virginia Bankshares, the district court should not have dismissed Ehrenberg's or Mayer's complaints under Rule 12(b)(6).

988 F.2d at 639.

The Third Circuit, by contrast, claimed the same foundation for exactly the opposite result. (See App., infra, A-47; 7 F.3d at 372 (Virginia Bankshares "supports rather than undermines the

application of the bespeaks caution doctrine in this case")). Strangely, however, the Court of Appeals claimed the Sixth Court supported its conclusion even while it ignored the Sixth Circuit's explicit determination in Mayer that the "bespeaks caution" doctrine could not be invoked at the pleading stage: instead, the Court below cited Sinay -- the very decision overruled in Mayer on the authority of Virginia Bankshares.[8]

Other divisions also plague the Courts of Appeals in their application of the "bespeaks caution doctrine. While the Third and Sixth Circuits ground the concept in the requirement of materiality, the Second Circuit rests

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8. Yet the Third Circuit was not unaware of the Mayer decision: it made an effort to distinguish the case in note 16 of its own opinion. App., infra, A-52; 7 F.3d at 373 n. 16.

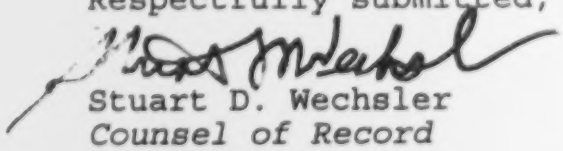
its interpretation of the "bespeaks caution" doctrine on the concept of reliance. See Brown v. E.F. Hutton Group, 991 F.2d 1020, 1031 (2d Cir. 1993) (invoking bespeaks caution doctrine to conclude that "reliance [on statements at issue] * * * is not justified as a matter of law"). The conceptual distinction matters, because the source of the doctrine determines the law that governs its application. For example, unlike an action under Section 10(b) of the Securities Exchange Act of 1934, as amended, an action under Section 11 of the Securities Act of 1933, as amended does not require plaintiffs to establish reliance. Herman & MacLean v. Huddleston, 459 U.S. 375, 381-85 (1983). In view of the increasing frequency with which courts are applying what they refer to as the

"bespeaks caution" doctrine, this Court's guidance as to the correct formulation and application of the doctrine is clearly needed.

CONCLUSION

For each of the foregoing reasons, petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,



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January 12, 1994

APPENDIX

IN RE DONALD J. TRUMP CASINO SECURITIES LITIGATION--TAJ MAHAL LITIGATION.

SIDNEY L. KAUFMAN, suing individually and on behalf of a class of persons similarly situated; JEROME SCHWARTZ, suing individually and on behalf of a class of persons similarly situated; PETER STUYVESANT, LTD., on behalf of itself and all others similarly situated; SUSAN CAGAN; ERIC CAGAN; DAVID E. DOUGHERTY; JEAN CURZIO; ALEXANDER L. CHARNIS; DOROTHY ARKELL; FRED GLOSSNER; HERMAN KRANGEL; ROBERT KLOSS; HELEN KLOSS; FAIRMOUNT FINANCIAL CORP.; JOANNE GOLLOMP; DINO DEL ZOTTO,

v.

TRUMP'S CASTLE FUNDING; TRUMP'S CASTLE ASSOCIATES LIMITED PARTNERSHIP, a New Jersey Limited Partnership; TRUMP TAJ MAHAL FUNDING, INC., a New Jersey Corporation; TRUMP TAJ MAHAL ASSOCIATES LIMITED PARTNERSHIP, a New Jersey Limited Partnership; DONALD J. TRUMP; ROBERT S. TRUMP; JOHN O'DONNELL; NATHAN KATZ; TIM MALAND; FRANCISCO TEJEDA; JULIAN MENARGUEZ; HARVEY I. FREEMAN; PAUL HENDERSON; PATRICK C. MCKOY; EDWARD M. TRACY; MICHAEL S. VAUTRIN; JEFFREY A. ROSS; JOHN P. BELISLE; TIMOTHY G. ROSE; LORI TAYLOR; C. "BUCKY" WILLARD; THE TRUMP ORGANIZATION, INC.; TRUMP TAJ MAHAL, INC.; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED.

(D.C. No. 90-MC-919)

SIDNEY L. KAUFMAN, suing individually and on behalf of a class of persons similarly situated,

v.

TRUMP'S CASTLE FUNDING; TRUMP'S CASTLE ASSOCIATES LIMITED PARTNERSHIP, a New Jersey Limited Partnership; TRUMP TAJ MAHAL FUNDING, INC., a New Jersey Corporation; TRUMP TAJ MAHAL ASSOCIATES LIMITED PARTNERSHIP, a New Jersey Limited Partnership; DONALD J. TRUMP.

(D.C. No. 9002349)

JEROME SCHWARTZ, suing individually and on behalf of a class of persons similarly situated,

v.

TRUMP'S CASTLE FUNDING, INC. (A New Jersey Corporation); TRUMP'S CASTLE ASSOCIATES LIMITED PARTNERSHIP (A New Jersey Limited Partnership); TRUMP TAJ MAHAL FUNDING, INC. (A New Jersey Corporation); TRUMP TAJ MAHAL ASSOCIATES LIMITED PARTNERSHIP (A New Jersey Limited Partnership); DONALD J. TRUMP.

(D.C. Civil No. 90-02350)

PETER STUYVESANT, LTD., on behalf of itself and all others similarly situated,

v.

DONALD J. TRUMP; ROBERT S. TRUMP; JOHN O'DONNELL; TRUMP PLAZA FUNDING, INC.; NATHAN KATZ; TIM MALAND; TRUMP PLAZA ASSOCIATES; FRANCISCO TEJEDA; JULIAN

MENARGUEZ; HARVEY I. FREEMAN; PAUL HENDERSON; PATRICK C. MCKOY; EDWARD M. TRACY; MICHAEL S. VAUTRIN; JEFFREY A. ROSS; JOHN P. BELISLE; TIMOTHY G. ROSE; TRUMP'S CASTLE FUNDING, INC.; LORI TAYLOR; TRUMP'S CASTLE ASSOCIATES LIMITED PARTNERSHIP.

(D.C. Civil No. 90-05004)

SUSAN CAGAN; ERIC CAGAN; DAVID E. DOUGHERTY; JEAN CURZIO,

v.

DONALD J. TRUMP; ROBERT S. TRUMP; HARVEY I. FREEMAN; C. "BUCKY" WILLARD; TRUMP TAJ MAHAL FUNDING, INC.; TRUMP TAJ MAHAL ASSOCIATES LIMITED PARTNERSHIP; THE TRUMP ORGANIZATION, INC.; TRUMP TAJ MAHAL INCORPORATED; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED.

(D.C. Civil No. 90-05051)

ALEXANDER L. CHARNIS; DOROTHY ARKELL,

v.

DONALD J. TRUMP; ROBERT S. TRUMP; HARVEY I. FREEMAN; C. "BUCKY" WILLARD; TRUMP TAJ MAHAL FUNDING, INC.; TRUMP TAJ MAHAL ASSOCIATES LIMITED PARTNERSHIP; THE TRUMP ORGANIZATION, INC.; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED.

(D.C. Civil No. 90-05052)

FAIRMONT FINANCIAL CORP.; JOANNE GOLLOMP, on behalf of themselves and all others similarly situated,

v.

DONALD J. TRUMP; HARVEY S. FREEMAN; ROBERT S. TRUMP; THE TRUMP ORGANIZATION, INC.; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED; TRUMP TAJ MAHAL FUNDING, INC.; TRUMP TAJ MAHAL, INC.; TRUMP TAJ MAHAL ASSOCIATES LIMITED PARTNERSHIP.

(D.C. Civil No. 91-00018)

ROBERT KLOSS; HELEN KLOSS,

v.

DONALD J. TRUMP; ROBERT S. TRUMP; HARVEY I. FREEMAN; C. "BUCKY" WILLARD; TRUMP TAJ MAHAL ASSOCIATES LIMITED PARTNERSHIP; THE TRUMP ORGANIZATION, INC.; TRUMP TAJ MAHAL, INC.; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED.

(D.C. Civil No. 91-0019)

FRED GLOSSNER; HERMAN KRANGEL,

v.

DONALD J. TRUMP; HARVEY S. FREEMAN; ROBERT S. TRUMP; THE TRUMP ORGANIZATION, INC.; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED; TRUMP TAJ MAHAL FUNDING, INC.; TRUMP

TAJ MAHAL, INC.; TRUMP TAJ MAHAL ASSOCIATES LIMITED PARTNERSHIP.

(D.C. Civil No. 00020)

DINO DEL ZOTTO,

v.

DONALD J. TRUMP; ROBERT S. TRUMP; HARVEY I. FREEMAN; C. "BUCKY" WILLARD; TRUMP TAJ MAHAL FUNDING, INC.; TRUMP TAJ MAHAL ASSOCIATES; THE TRUMP ORGANIZATION, INC.; TRUMP TAJ MAHAL, INC.; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED.

(D.C. Civil No. 92-00621)

Joanne Gollomp, Susan Cagan, Eric Cagan, David E. Dougherty, Jean Curzio, Robert and Helen Kloss, Fred Glossner, Herman Krangel, Sidney Kaufman, Jerome Schwartz, Dino Del Zotto, Alexander L. Charnis and Dorothy Arkell, on behalf of themselves and all others similarly situated, *Appellants*.

On Appeal From the United States District Court for the District of New Jersey

(D.C. Civil Nos. 90-MC-919, 90-02349, 90-02350, 90-05004, 90-05051, 90-05052, 91-00018, 91-00019, 91-00020, 92-00621)

Argued Jan. 29, 1993.

Stuart D. Wechsler (argued), Joel C. Feffer, New York City, Stanley R. Wolfe, Todd S. Collins, Berger & Montague, P.C., Philadelphia, PA, Carl D. Poplar, Cherry Hill, NJ, Gerald Jay Rodos, Barrack, Rodos & Bacine, Philadelphia, PA, Robert S. Schachter, Zwerling, Schachter & Zwerling, Bruce E. Gerstein, Garwin, Bronzaft, Gerstein & Fisher, New York City, Charles V. Van de Walle, Martin, Van de Walle, Guardino & Donohue, Great Neck, NY, Jared Stamell, Joseph J. Tabacco, Jr., Stamell, Tabacco & Schager, Joseph H. Weiss, New York City, Michael A. Cohan, Cohan & Eckhaus, Parlin, NJ, James V. Bashian, New York City, C. Oliver Burt, III, James R. Malone, Mark C. Rifkin, Debra N. Nathanson, Greenfield & Chimicles, Haverford, PA, Howard A. Specter, Pittsburgh, PA, for appellants.

Richard L. Posen (argued), Willkie Farr & Gallagher, New York City, John J. Barry, Clapp & Eisenberg, P.C., Newark, NJ, Stuart J. Baskin (argued), Shearman & Sterling, New York City, for appellees.

Before: BECKER, ALITO, Circuit Judges and ATKINS, District Judge.*

BECKER, *Circuit Judge*.

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* The Honorable C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

This is an appeal from orders of the district court for the District of New Jersey dismissing a number of complaints brought under various provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 by a class of investors who purchased bonds to provide financing for the acquisition and completion of the Taj Mahal, a lavish casino/hotel on the boardwalk in Atlantic City, New Jersey. The defendants are Donald J. Trump ("Trump"), Robert S. Trump, Harvey S. Freeman, the Trump Organization Inc., Trump Taj Mahal Inc., Taj Mahal Funding Inc. and Trump Taj Mahal Associates Limited Partnership (the "Partnership")[1] (collectively the "Trump defendants") and Merrill Lynch, Pierce,

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1. The Partnership was composed of Trump and Trump Taj Mahal Inc. as the general partners and Trump as the sole limited partner. Taj Mahal Funding Inc., which actually issued the bonds, immediately loaned the proceeds to the Partnership.

Fenner and Smith Inc. ("Merrill Lynch"). The complaints allege that the prospectus accompanying the issuance of the bonds contained affirmatively misleading statements and materially misleading omissions in contravention of the federal securities laws.

The district court dismissed the securities law claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The linchpin of the district court's decision was what has been described as the "bespeaks caution" doctrine, according to which a court may determine that the inclusion of sufficient cautionary statements in a prospectus renders misrepresentations and omissions contained therein nonactionable. While the viability of the bespeaks caution doctrine is an issue of first impression

for this court, we believe that it primarily represents new nomenclature rather than substantive change in the law. As we see it, "bespeaks caution" is essentially shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law.

We believe that the bespeaks caution doctrine is both viable and applicable to the facts of this appeal. The prospectus here took considerable care to convey to potential investors the extreme risks inherent in the venture while simultaneously carefully alerting the investors to a variety of obstacles the Taj Mahal would face, all of which were relevant to a potential investor's decision concerning purchase of the

bonds. We conclude that, given these warning signals in the text of the prospectus itself, the plaintiffs cannot establish that a reasonable investor would find the alleged misstatements and omissions material to his or her decision to invest in the Taj Mahal. Hence we will affirm the district court's orders.

Inasmuch as some plaintiffs filed their complaints in other districts, and the Judicial Panel on Multidistrict Litigation (the "JPML") transferred them to the district court for the District of New Jersey under 28 U.S.C. § 1407 for consolidated pre-trial proceedings (as opposed to a transfer for all purposes, such as under 28 U.S.C. § 1404(a) or 1406), the question arises whether the district court possessed authority to issue dispositive pre-trial orders terminating the cases so transferred. It

seems to be widely accepted that § 1407 and the rules promulgated thereunder empower a transferee court to enter dispositive orders to terminate a case, but there is no reported case law so holding. We take this opportunity to confirm the power of the transferee court to enter a Rule 12(b)(6) dismissal.

I. Facts and Procedural History

In November, 1988 the Trump defendants offered to the public $675 million in first mortgage investment bonds (the "bonds") with Merrill Lynch acting as the sole underwriter. The interest rate on the bonds was 14%, a high rate in comparison to the 9% yield offered on quality corporate bonds at the time. The Trump defendants issued the bonds to raise capital to: (1) purchase the Taj Mahal, a partially-completed casino/hotel located on the boardwalk,

from Resorts International, Inc. (which had already invested substantial amounts in its construction); (2) complete construction of the Taj Mahal; and (3) open the Taj Mahal for business.

As is well-known, the Taj Mahal was widely touted as Atlantic City's largest and most lavish casino resort. When ultimately opened in April, 1990 it was at least twice the size of any other casino in Atlantic City. It consisted of a 42-story hotel tower that contained approximately 1,250 guest rooms and an adjacent low-rise building encompassing roughly 155,000 square feet of meeting, ballroom and convention space, a 120,000 square foot casino, and numerous restaurants, lounges and stores. The entire structure occupied approximately seventeen acres of land.

The prospectus accompanying the bonds estimated the completion cost of the Taj Mahal, including the payment of interest on the bonds for the first fifteen months of operation, at $805 million. It explained that, to obtain that amount, the Trump defendants were relying on the $675 million in bond proceeds, a $75 million capital contribution by Donald Trump, investment income derived from those sums, a contingent additional loan of $25 million from the Trump Line of Credit, and loans from other sources.

Plaintiffs ground their lawsuits in the text of the prospectus. Their strongest attack focuses on the "Management Discussion and Analysis" ("MD & A") section of the prospectus, which stated: "The Partnership believes that funds generated from the operation of the

Taj Mahal will be sufficient to cover all of its debt service (interest and principal)." *See* Complaint at ¶ 32. The plaintiffs' primary contention is that this statement was materially misleading because the defendants possessed neither a genuine nor a reasonable belief in its truth. However, as the defendants emphasize, the prospectus contained numerous disclaimers and cautionary statements in conjunction with this statement. The cautionary statements stressed, among other things: the intense competition in the casino industry; the absence of an operating history for the Taj Mahal which could serve as a basis for its valuation; the unprecedented size of the Taj Mahal casino in Atlantic City; and the enterprise's potential inability to repay the interest on the bonds in the event of

a mortgage default and subsequent liquidation of the Taj Mahal.

After learning that the Trump defendants planned to file Chapter 11 bankruptcy proceedings and establish a reorganization plan, various bondholders filed separate complaints in the United States District Courts for the Southern District of New York, the Eastern District of New York and the District of New Jersey. The complaints each alleged that the prospectus accompanying the issuance of the bonds contained material misrepresentations and material omissions in violation of the 1933 and 1934 Acts. Pursuant to 28 U.S.C. § 1407, the JPML subsequently transferred the complaints for consolidated pre- trial proceedings to the District of New Jersey. *See* MDL Docket No. 864 (*In re Donald J. Trump Sec. Litig.*).

The consolidated complaints pleaded four counts. In count one, the plaintiffs alleged that the prospectus contained misrepresentations and omissions of material fact in violation of §§ 11,[2] 12(2)[3] and 15 of the

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2. Section 11(a) provides in pertinent part:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security ... may ... sue--
>
> (1) every person who signed the registration statement;
>
> (2) every person who was a director of ... or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted:
>
> . . . . .
>
> (5) every underwriter with respect to such security.

15 U.S.C. § 77k(a).

3. Section 12(2) establishes the liability of any seller or offeror of a security who:

Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §§ 77k(a), 771 (2), 77o. Count two of the complaints alleged fraud in the prospectus, based on the same alleged misrepresentations and omissions, but in violation of §§ 10(b)[4] and 20(a)[5] of the

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> by means of a prospectus or oral communication ... includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission....

15 U.S.C. § 771(2).

4. Section 10(b) provides in pertinent part:

> It shall be unlawful for any person, directly or indirectly ...
>
> > (b) [t]o use or employ, in connection with the purchase or sale of any security ..., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Securities Exchange Act of 1934 (the "1934 Act") and Rule 10(b)(5)[6] promulgated thereunder, 15 U.S.C. §§ 78j(b), 78t(a), and 17 C.F.R. § 240.10(b)-5. Counts three and four alleged state common law claims.

The defendants moved to dismiss the complaints pursuant to Rule 12(b)(6),

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5. Section 15 of the Securities Act of 1933 and s 20(a) of the Securities Exchange Act of 1934 establish liability for those "controlling persons" who violate the substantive provisions of the respective acts. See 15 U.S.C. §§ 77o, 78t(a).

6. Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality ...
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

asserting that the plaintiffs had failed to state actionable securities fraud claims, and also pursuant to Fed.R.Civ.P. 9(b), contending that the plaintiffs failed to plead their fraud allegations with sufficient particularity. The district court granted the defendants' motion under Rule 12(b)(6), reasoning that the abundance of cautionary statements that directly addressed the alleged misrepresentations and omissions rendered the plaintiffs' claims nonactionable as a matter of law. *See In re Donald J. Trump Casino Sec. Litig.*, 793 F. Supp. 543 (D.N.J. 1992). The district court also rejected the plaintiffs' motion to amend their complaints to add allegations based on an appraisal of the future value of the Taj Mahal which had been issued by the accounting firm of Laventhol and Horwath

("the Laventhol Report"). The district court did not reach the defendants' motion to dismiss based on Rule 9(b). Having disposed of the federal claims, the court subsequently dismissed the plaintiffs' claims of breach of fiduciary duty and false advertising without prejudice for lack of pendent jurisdiction. 793 F. Supp. at 568. This appeal followed.

The district court had jurisdiction over the federal securities law claims under 15 U.S.C. §§ 77v and 78aa and over the state law claims under 28 U.S.C. § 1367. We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the district court's dismissal of the plaintiffs' complaint under Rule 12(b)(6). *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593, 595 (3d Cir.1990). In this regard, we must

accept the plaintiffs' factual allegations as true and give the plaintiffs the benefit of the inferences which we may fairly draw from them. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974).

II. *The Parties' Contentions*

The plaintiffs allege that the prospectus contained material misrepresentations. Their principal claim is that the defendants had neither an honest belief in nor a reasonable basis for one statement in the MD & A section of the prospectus: "The Partnership believes that funds generated from the operation of the Taj Mahal will be sufficient to cover all of its debt service (interest and principal)." Before the district court and again before us, the plaintiffs concentrate on

this statement and its allegedly misleading character.

The plaintiffs also argue that the prospectus was misleading in its omission of allegedly material information. The plaintiffs submit that the prospectus failed to disclose, inter alia, that: 1) the Taj Mahal required an average "casino win" of approximately $1.3 million per day on a continuing basis in order to service its debtload; 2) Donald Trump had personally guaranteed hundreds of millions of dollars in bank loans for other properties; and 3) the Taj Mahal had an "unprecedented" debt to equity ratio.[7] The plaintiffs contend that

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7. As we noted above, the district court denied the plaintiffs' motion to amend their complaint to add allegations that the prospectus did not disclose the existence of the Laventhol Report and the substance of its conclusions. The plaintiffs have been equivocal, however, as to whether they challenge the district court's denial of their motion to amend here. They did not raise the denial of their motion to amend in their statement of the issues.

these allegedly material misrepresentations and omissions form the basis for actionable securities fraud claims and that, to the extent that the prospectus contained cautionary language, the district court improperly considered the effect of this language on a motion to dismiss.

Moreover, they expressly stated in their opening brief that they did not wish to challenge this portion of the district court's order: "Plaintiffs asked the [district court] to consider the Laventhol Report.... The district court declined to do so ... and *plaintiffs do not challenge that decision here*.... Plaintiffs do not now ask this Court to consider the prescience of the Laventhol Report or to consider the omission of any mention of this report from the Prospectus." Brief for Appellants at 10-11 n. 8 (emphasis added). Nevertheless, in their reply brief and at oral argument plaintiffs advanced arguments premised on the Laventhol Report. It is well-established that, "[a]s a general matter, the courts of appeals will not consider arguments raised on appeal for the first time in a reply brief." *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 205 n.29 (3d Cir. 1990); *accord International Raw Materials, Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318, 1327 n. 11 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1588 (1993). Under these circumstances, then, we will not reach the merits of this issue.

The defendants respond that the myriad warnings and cautionary statements contained in the prospectus sufficiently disclosed to the bondholders the multifarious risks inherent in the investment. With respect to the plaintiffs' primary argument--that the statement relating the Partnership's belief in the Taj Mahal's capacity to generate ample income for the Partnership to make full payment on the bonds was materially misleading--the defendants contend that there was also adequate cautionary language surrounding this statement to render it nonactionable as a matter of law. That is, they insist that when a prospectus (such as this one) contains abundant warnings and cautionary statements which qualify the statements plaintiffs claim they relied upon,plaintiffs cannot, as a matter of

law, contend that they were misled by the alleged misrepresentations and/or omissions.

III. *The District Court's Authority to Terminate the Case Under 28 U.S.C. § 1407*

As we noted above, the JPML transferred a number of complaints that different plaintiffs had filed in the Southern and Eastern Districts of New York to the District of New Jersey for consolidated pre-trial proceedings pursuant to 28 U.S.C. § 1407. At oral argument, the question arose whether the district court possessed the authority to terminate the transferred cases under Rule 12(b)(6). Surprisingly, no judicial precedent addresses this point, so we take this opportunity to make clear that § 1407 empowers transferee courts to enter a dispositive pre-trial order terminating a case.

Section 1407 authorizes the consolidation and transfer of civil actions containing common questions of fact "for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The section further directs that the transferee court should remand the case to the transferor court "unless it shall have been previously terminated," which suggests that Congress contemplated that transferee courts would dismiss cases in response to dispositive motions. The dismissal of a complaint under Rule 12(b)(6) constitutes such a pre-trial proceeding.

Apparently, transferee courts frequently terminate consolidated cases in practice. *See In re Korean Air Lines Disaster*, 829 F.2d 1171, 1176 n. 9 (D.C.Cir.1987) (noting that as of 1986 transferee courts had terminated over

two-thirds of all cases subject to § 1407 proceedings), *aff'd sub nom., Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 109 S. Ct. 1676 (1989). Moreover, the practice comports with the rules the JPML promulgated pursuant to § 1407, see Rule 14(a) ("Actions terminated in the transferee district court by valid judgment, including ... judgment of dismissal ..., shall not be remanded ... and shall be dismissed by the transferee district court."), as well as the views of commentators. *See* Manual for Complex Litigation, Second, § 31.122, at 254 (1985) (stating "[t]he transferee judge has the power to terminate actions by rulings on motions under Fed.R.Civ.P. 12"); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 582-83 (1978).

In sum, we are satisfied that § 1407 empowered the district court to dismiss the plaintiffs' complaint under Rule 12(b)(6).[8]

IV. *The Alleged Affirmative Material Misrepresentations in the Prospectus*

As we explained above, the plaintiffs assert that the Trump defendants had neither an honest nor a reasonable belief in their statement on page 28 of the prospectus that "[t]he Partnership believes that funds generated

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8. The transfer of the complaints filed in the Southern and Eastern Districts of New York to the District of New Jersey presents a potential choice of law issue in terms of whether Second or Third Circuit precedent controls. The district court followed the approach the D.C. Circuit adopted in the leading case on choice of law in multidistrict transfers, *see In re Korean Air Lines Disaster*, 829 F.2d at 1176. Consequently, the district court held that while only this court's precedent would control, the Second Circuit's precedent would merit close consideration. *See In re Donald J. Trump Sec. Litig.*, 793 F. Supp. at 548. Because neither party has challenged the district court's holding on this point, we assume without deciding that it was correct.

from the operation of the Taj Mahal will be sufficient to cover all of its debt service (interest and principal)." The plaintiffs contend that, in view of this allegation, they have stated a cause of action under the federal securities laws. We disagree.[9]

A. *General Legal Principles*

At a minimum, each of the securities fraud provisions which the bondholders allege the Trump defendants violated requires proof that the defendants made untrue or misleading statements or omissions of material fact. *See Shapiro*

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9. Although the plaintiffs did not attach the prospectus to their complaint, the defendants appended it to their motion to dismiss. We recently held that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Because the complaint directly challenged the prospectus, the district court properly considered the prospectus in deciding whether to grant the Rule 12(b)(6) motion.

v. UJB Fin. Corp., 964 F.2d 272, 280, 286 (3d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).[10] We have squarely held that opinions, predictions and other forward-looking statements are not per se inactionable under the securities laws. Rather, such statements of "soft information" may be actionable misrepresentations if the speaker does not genuinely and reasonably believe

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10. There are substantial differences between the elements a plaintiff must establish under s 10 and Rule 10b-5 of the Securities Exchange Act of 1934 and under ss 11 and 12(2) of the Securities Act of 1933. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 380-86, 103 S. Ct. 683, 686-89 (1983). Under the former, the plaintiffs must plead not only that the defendants made material omissions and/or misrepresentations, but also that they reasonably relied on them and that the defendants acted with knowledge or recklessness. *See id.* at 382, 103 S. Ct. at 687; *Shapiro*, 964 F.2d at 280. In contrast, ss 11 and 12(2) impose no such requirements. *See Herman & MacLean*, 459 U.S. at 383-84, 103 S. Ct. at 688; *Shapiro*, 964 F.2d at 286. Because our analysis here is predicated on the materiality requirement, which is common to all the causes of action the plaintiffs allege, we do not here distinguish between the various securities law provisions that the plaintiffs invoke.

them.[11] *See, e.g., Herskowitz v. Nutri/System, Inc.*, 857 F.2d 179, 184 (3d Cir. 1988), *cert. denied*, 489 U.S. 1054, 109 S. Ct. 1315 (1989); *Eisenberg v. Gagnon*, 766 F.2d 770, 776 (3d Cir.), *cert. denied sub nom., Wasserstrom v. Eisenberg*, 474 U.S. 946, 106 S. Ct. 342 (1985). Therefore, the plaintiffs' complaint does not falter just because it alleges that the defendants made a misrepresentation with their statement that they believed they would be able to repay the principal and interest on the bonds. Rather, the complaint cannot survive a motion to dismiss because ultimately it does not sufficiently

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11. "The term soft information refers to statements of subjective analysis or extrapolation, such as opinions, motives, and intentions, or forward looking statements, such as projections, estimates, and forecasts." *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 642 (3d Cir. 1989). *See generally* Victor Brudney, *A Note on Materiality and Soft Information Under the Federal Securities Laws*, 75 Va. L. Rev. 723 (1989).

allege that the defendants made a material misrepresentation.

The Supreme Court in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 96 S. Ct. 2126 (1976), defined materiality within the proxy-solicitation context of § 14(a) of the 1934 Act. Subsequently the Court expressly made the TSC standard applicable to actions under § 10 and Rule 10b-5, *see Basic Inc. v. Levinson*, 485 U.S. 224, 232, 108 S. Ct. 978 (1988), and we have made it applicable as well to claims under §§ 11 and 12(2) of the 1933 Act, *see Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 641 & n. 18 (3d Cir.1989). *TSC* instructs that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [act]." 426 U.S. at 449, 96 S. Ct. at 2132. For an omission to be

deemed material, "there must be a substantial likelihood that [its disclosure] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.*[12]

As the statement quoted immediately above implies, materiality is a relative concept, so that a court must appraise a misrepresentation or omission in the complete context in which the author

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12. In *TSC* the Court also indicated that setting the threshold for materiality too low would not serve the remedial purposes of the securities laws:

> Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good.... [I]f the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but [it] also ... may cause [management] to bury the shareholders in an avalanche of trivial information--a result that is hardly conducive to informed decisionmaking.

426 U.S. at 448-49, 96 S. Ct. at 2132.

conveys it. *See I. Meyer Pincus & Assocs. v. Oppenheimer & Co.*, 936 F.2d 759, 763 (2d Cir.1991).[13] In other words, a particular misrepresentation or omission significant to a reasonable investor in one document or circumstance may not influence a reasonable investor in another. We accordingly take into account not only the assertion that the Partnership believed the Taj Mahal could meet the obligations of the bonds, but also other relevant statements contained in the prospectus.

B. *The Text of the Prospectus*

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13. Although materiality is a mixed question of law and fact which the trier of fact ordinarily decides, *see TSC*, 426 U.S. at 450, 96 S. Ct. at 2132-33; *Shapiro*, 964 F.2d at 280 n.11, "if the alleged misrepresentations or omissions are so obviously unimportant to an investor that reasonable minds cannot differ on the question of materiality [it is] appropriate for the district court to rule that the allegations are inactionable as a matter of law." *Shapiro*, 964 F.2d at 280 & n.11; *accord TSC*, 426 U.S. at 450, 96 S. Ct. at 2133; *Craftmatic*, 890 F.2d at 641.

The prospectus at issue contained an abundance of warnings and cautionary language which bore directly on the prospective financial success of the Taj Mahal and on the Partnership's ability to repay the bonds. We believe that given this extensive yet specific cautionary language, a reasonable factfinder could not conclude that the inclusion of the statement "[t]he Partnership believes that funds generated from the operation of the Taj Mahal will be sufficient to cover all of its debt service (interest and principal)" would influence a reasonable investor's investment decision. More specifically, we believe that due to the disclaimers and warnings the prospectus contains, no reasonable investor could believe anything but that the Taj Mahal bonds represented a rather risky, speculative investment which might

yield a high rate of return, but which alternatively might result in no return or even a loss. We hold that under this set of facts, the bondholders cannot prove that the alleged misrepresentation was material.

The statement the plaintiffs assail as misleading is contained in the MD & A section of the prospectus, which follows the sizable "Special Considerations" section, a section notable for its extensive and detailed disclaimers and cautionary statements. More precisely, the prospectus explained that, because of its status as a new venture of unprecedented size and scale, a variety of risks inhered in the Taj Mahal which could affect the Partnership's ability to repay the bondholders. For example, it stated:

> The casino business in Atlantic City, New Jersey has a seasonal

nature of which summer is the peak season.... Since the third interest payment date on the Bonds [(which constitutes the first interest payment not paid out of the initial financing)] occurs before the summer season, the Partnership will not have the benefit of receiving peak season cash flow prior to the third interest payment date, which could adversely affect its ability to pay interest on the Bonds.

... The Taj Mahal has not been completed and, accordingly, has no operating history. The Partnership, therefore, has no history of earnings and its operations will be subject to all of the risks inherent in the establishment of a new business enterprise. Accordingly, the ability of the Partnership to service its debt to [Taj Mahal Funding Inc., which issued the bonds,] is completely dependent upon the success of that operation and such success will depend upon financial, business, competitive, regulatory and other factors affecting the Taj Mahal and the casino industry in general as well as prevailing economic conditions....

The Taj Mahal will be the largest casino/hotel complex in Atlantic City, with approximately twice the room capacity and casino space of many of the existing casino/hotels in Atlantic City. [No] other casino/hotel operator has had experience operating a complex the

> size of the Taj Mahal in Atlantic City. Consequently, no assurance can be given that, once opened, the Taj Mahal will be profitable or that it will generate cash flow sufficient to provide for the payment of the debt service....

Prospectus at 8.

The prospectus went on to relate, as part of its "Security for the Bonds" subsection, the potential effect of the Partnership's default on its mortgage payments. For example, this subsection unreservedly explained that if a default occurred prior to completion of the Taj Mahal, "there would not be sufficient proceeds [from a foreclosure sale of the Taj Mahal] to pay the principal of, and accrued interest on, the Bonds." Prospectus at 9.

The "Special Considerations" section also detailed the high level of competition for customers the completed

Taj Mahal would face once opened to the public:

> Competition in the Atlantic City casino/hotel market is intense. At present, there are twelve casino/hotels in Atlantic City.... Some Atlantic City casino/hotels recently have completed renovations or are in the process of expanding and improving their facilities.... *The Partnership believes* that, based upon historical trends, *casino win per square foot of casino space will decline in 1990* as a result of a projected increase in casino floor space, including the opening of the Taj Mahal.

Prospectus at 14 (emphasis added). In a section following the MD & A section, the prospectus reiterated its reference to the intense competition in the Atlantic City casino industry:

> Growth in Atlantic City casino win is expected to be restrained until further improvements to the City's transportation system and infrastructure are undertaken and completed and the number of non-casino hotel rooms and existing convention space are increased. No assurance can be given with respect to either the future growth of the Atlantic City gaming market or the ability of the Taj Mahal to attract

> a representative share of that market.

Prospectus at 33. The prospectus additionally reported that there were risks of delay in the construction of the Taj Mahal and a risk that the casino might not receive the numerous essential licenses and permits from the state regulatory authorities. *See* Prospectus at 11-13, 15-16, 35-37.

In this case the Partnership did not bury the warnings about risks amidst the bulk of the prospectus. Indeed, it was the allegedly misleading statement which was buried amidst the cautionary language. At all events, in addition to reading the allegedly misleading statement setting forth the Partnership's belief that it could repay the principal and interest on the bonds, a prospective investor would have also read the dire warnings and cautionary statements a

sampling of which we have just outlined. Moreover, an investor would have read the sentence immediately following the challenged statement, which cautioned: "[n]o assurance can be given, however, that actual operating results will meet the Partnership's expectations."

As we explained above, we must consider an alleged misrepresentation within the context in which the speaker communicated it. Here the context clearly and precisely relayed to the bondholders the substantial uncertainties inherent in the completion and operation of the Taj Mahal. The prospectus contained both general warnings that the Partnership could not assure the repayment of the bonds as well as specific discussions detailing a variety of risk factors that rendered the completion and profitable operation of

the Taj Mahal highly uncertain. Within this broad context the statement at issue was, at worst, harmless.

C. *The Bespeaks Caution Doctrine*

The district court applied what has come to be known as the "bespeaks caution" doctrine. In so doing it followed the lead of a number of courts of appeals which have dismissed securities fraud claims under Rule 12(b)(6) because cautionary language in the offering document negated the materiality of an alleged misrepresentation or omission. *See Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1040 (6th Cir. 1991); *I. Meyer Pincus & Assocs. v. Oppenheimer & Co.*, 936 F.2d 759, 763 (2d Cir. 1991); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 (1st Cir. 1991); *Polin v. Conductron Corp.*, 552 F.2d 797, 806 n. 28 (8th

Cir.), *cert. denied*, 434 U.S. 857, 98 S. Ct. 178 (1977); *cf. Huddleston v. Herman & MacLean*, 640 F.2d 534, 543-44 (5th Cir. 1981) (holding that a general warning was insufficient to render a known misrepresentation immaterial as a matter of law), *modified*, 459 U.S. 375, 103 S. Ct. 683 (1983); *see also In re Convergent Technologies Sec. Litig.*, 948 F.2d 507, 515-16 (9th Cir.1991) (applying but not explicitly referencing the bespeaks caution doctrine to uphold a grant of summary judgment for the defendant). We are persuaded by the *ratio decidendi* of these cases and will apply bespeaks caution to the facts before us.

The application of bespeaks caution depends on the specific text of the offering document or other communication at issue, i.e., courts must assess the

communication on a case-by-case basis. *See Flynn v. Bass Bros. Enters.*, 744 F.2d 978, 988 (3d Cir. 1984) (holding courts must determine the materiality of soft information on a case-by-case basis). Nevertheless, we can state as a general matter that, when an offering document's forecasts, opinions or projections are accompanied by meaningful cautionary statements, the forward-looking statements will not form the basis for a securities fraud claim ... if those statements did not affect the "total mix" of information the document provided investors. In other words, cautionary language, if sufficient, renders the alleged omissions or misrepresentations immaterial as a matter of law.

The bespeaks caution doctrine is, as an analytical matter, equally applicable to allegations of both affirmative

misrepresentations and omissions concerning soft information. Whether the plaintiffs allege a document contains an affirmative prediction/opinion which is misleading or fails to include a forecast or prediction which failure is misleading, the cautionary statements included in the document may render the challenged predictive statements or opinions immaterial as a matter of law. Of course, a vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation. To suffice, the cautionary statements must be substantive and tailored to the specific future projections, estimates or opinions in the prospectus which the plaintiffs challenge.

Because of the abundant and meaningful cautionary language contained in the prospectus, we hold that the plaintiffs have failed to state an actionable claim regarding the statement that the Partnership believed it could repay the bonds. We can say that the prospectus here truly bespeaks caution because, not only does the prospectus generally convey the riskiness of the investment, but its warnings and cautionary language directly address the substance of the statement the plaintiffs challenge. That is to say, the cautionary statements were tailored precisely to address the uncertainty concerning the Partnership's prospective ability to repay the bondholders.

Moreover, contrary to the submission of the plaintiffs, the Supreme Court's reasoning in *Virginia Bankshares, Inc. v.*

Sandberg, ____ U.S. ____, 111 S. Ct. 2749 (1991) supports rather than undermines the application of the bespeaks caution doctrine in this case. In *Virginia Bankshares*, the Court considered the actionability of statements of reasons, opinions or beliefs in the proxy-solicitation context under § 14(a) of the 1934 Act, 15 U.S.C. § 78n(a).[14] The Courtbasis. rejected the defendants' argument tnat a statement by corporate directors, made in the midst of an effort to effectuate a "freeze-out" merger, that in their opinion $42 a share was a fair price which would offer "high" value to

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14. Although the Court in *Virginia Bankshares* addressed § 14(a) of the 1934 Act, which concerns proxy statements, it is instructive here in addressing the plaintiffs' claims brought under §§ 11 and 12(2) of the 1933 Act, §§ 10 and 20 of the 1934 Act and Rule 10b-5 promulgated thereunder, which involve corporate communications in the sale of securities. *Cf. Basic Inc. v. Levinson*, 485 U.S. 224, 232, 108 S. Ct. 978, 983 (1988) (adopting the materiality standard under § 14 for § 10 and Rule 10b-5).

the minority stockholders, was inactionable under the securities laws. Consistent with our decisions pre-dating *Virginia Bankshares*, *see, e.g.*, *Eisenberg v. Gagnon*, 766 F.2d at 776, the Court held that statements of opinion or belief may be actionable when they expressly or impliedly assert something false or misleading about their subject matter. The Court further held that the specific statement at issue in the case was a proper basis for liability under § 14(a) because the minority shareholders reasonably understood it to rest on a factual basis. *See* ___ U.S. at ___, 111 S. Ct. at 2758-60.

In addition, the Court in *Virginia Bankshares* reached two conclusions directly relevant to the case at bar. First, the Court held that a speaker's subjective disbelief or motivation,

standing alone, would be inadequate to state a claim under § 14(a).[15] Second, and more importantly, by recognizing that an accompanying statement may neutralize the effect of a misleading statement, the Court impliedly accepted the logic of the bespeaks caution doctrine. *Id.* at ____, 111 S. Ct. at 2760. The Court explained:

> While a misleading statement will not always lose its deceptive edge simply by joinder with others that are true, the true statements may discredit the other one so obviously that the risk of real deception drops to nil. Since liability under § 14(a) must rest not only on deceptiveness but materiality as well[,] ... publishing accurate facts in a proxy statement can render a misleading statement too unimportant to ground liability.

Id.

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15. The Court stated: "We think that proof of mere disbelief or belief undisclosed should not suffice for liability under § 14(a), and if nothing more had been required or proven in this case we would reverse [the judgment in favor of the plaintiff] for that reason." *Virginia Bankshares*, ___ U.S. at ___, 111 S. Ct. at 2760.

The Court then refined this general principle to take on the same contours as what we have denoted as the bespeaks caution doctrine. In particular, the Court acknowledged that "not every mixture with the true will neutralize the deceptive. If it would take a financial analyst to spot the tension between the one and the other, whatever is misleading will remain materially so, and liability should follow." *Id.* at ___, 111 S. Ct. at 2760. In fact, this notion really comports with the general principle, because it merely underscores that when the subject of a misrepresentation or omission is such that the accompanying language does not diminish the importance of the misrepresentation or omission to the investor, the misrepresentation or omission remains actionable. In a word,

a misrepresentation or omission is actionable when materially misleading.

This reading of *Virginia Bankshares* just restates what what we explained above, namely, that materiality involves a context-specific analysis such that warnings and cautionary language will sometimes suffice to render the allegedly misleading misrepresentations or omissions immaterial as a matter of law. We understand *Virginia Bankshares* to indicate that if the nature of the subject matter or the manner of presentation of an alleged misrepresentation or omission or its accompanying statements is such that for a reasonable investor the accompanying statements do not offset the misleading effect of the misrepresentation or omission, then bespeaks caution is unavailable as a defense. Therefore,

contrary to the plaintiffs' assertion, we believe that our analysis comports with the Supreme Court's reasoning in *Virginia Bankshares*.[16]

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16. In *Mayer v. Mylod*, 988 F.2d 635 (6th Cir. 1993) the Sixth Circuit clarified and narrowed its decision in *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037 (6th Cir. 1991), which appeared to apply the bespeaks caution doctrine liberally, to eliminate any potential conflict with *Virginia Bankshares*. Contrary to the plaintiffs' argument, the interpretation of *Virginia Bankshares* in *Mayer* is consistent with ours.

In *Sinay*, the Sixth Circuit had held, apparently without reservation, that "[e]conomic projections are not actionable if they bespeak caution." 948 F.2d at 1040. In considering this broad statement in *Mayer*, the Sixth Circuit acknowledged its potential tension with the Supreme Court's recognition in *Virginia Bankshares* that, although the effect of some misrepresentations will be negated by the inclusion of other statements, "not every mixture with the true will neutralize the deceptive." *Virginia Bankshares*, ___ U.S. at ____, 111 S. Ct. at 2760 (emphasis added), quoted in *Mayer*, 988 F.2d at 639. The Mayer court thus properly recognized that in light of *Virginia Bankshares* its earlier statement, which one could have read to indicate that economic projections coupled with warnings and cautionary statements are per se non-actionable, was overbroad. Because we do not establish a sweeping rule that cautionary statements will always render misrepresentations or omissions immaterial as a matter of law, we believe that the *Mayer* court's understanding of *Virginia Bankshares* is

D. *Conclusion*

Returning to the instant case, we think it clear that the accompanying warnings and cautionary language served to negate any potentially misleading effect that the prospectus' statement about the Partnership's belief in its ability to repay the bonds would have on a reasonable investor. The prospectus clearly and precisely cautioned that the bonds represented an exceptionally risky, perhaps even speculative, venture and that the Partnership's ability to repay the bonds was uncertain. Given this context, we believe that no reasonable jury could conclude that the subject projection materially influenced a reasonable investor.[17]

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harmonious with our approach here.

17. The plaintiffs have also alleged that the prospectus was materially misleading in its estimation that as of its opening date the Taj Mahal would be worth approximately

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$1.1 billion. An independent appraisal conducted by the Appraisal Group International ("AGI") had arrived at that estimate. The plaintiffs submit that this estimate lacked an adequate basis in fact because AGI based it on " 'the capitalization of income approach,' even though at the time of the Prospectus it was impossible to make any reasonable estimate of the Taj Mahal's future income." Complaint at ¶ 37.

We conclude that, given the text of the prospectus, the plaintiffs have failed to state a claim under the securities laws through this allegation. As we discussed more fully above, *see supra* Part IV.B, the prospectus explicitly disclosed that the Taj Mahal, as a new enterprise, lacked any operating history, including any history of earnings. Moreover, the prospectus clearly and precisely set forth the speculative nature of this estimate and the consequent uncertainty that the Taj Mahal would actually be worth $1.1 billion by its opening date. This cautionary discussion, in combination with the more general warnings which alerted investors to the variety of highly uncertain circumstances the Taj Mahal confronted, rendered the estimate of the Taj Mahal's worth on its opening date immaterial.

We further note that the plaintiffs' allegation concerning the appraisal report fails to satisfy the particularity requirements of Rule 9(b), which at least applies to the plaintiffs' claims brought under § 10 and Rule 10b-5. *See Shapiro v. UJB Fin. Corp.*, 964 F.2d at 288 (leaving open the question whether Rule 9(b) always applies to claims brought under §§ 11 and 12(2) even when they sound in negligence rather than fraud). The complaint fails to allege (i) what established appraisal method the AGI Report should have used, (ii) how the capitalization of income approach departed from that method, and

V. *The Allegations Concerning Material Omissions*

The complaint also includes allegations that the prospectus omitted material facts. More specifically, the plaintiffs contend that the prospectus was materially misleading due to its failure to disclose certain facts which, for purposes of this appeal, we assume are all true: 1) the precarious nature of Trump's personal finances; 2) the fact that the Taj Mahal would require an average daily casino win of $1.3 million in order to repay the bonds in full; 3) the thinly-capitalized nature of the Taj Mahal; 4) the expense necessary to attract customers from other casinos to

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(iii) that the defendants recognized or should have recognized the unreasonableness of the capitalization of income approach as an estimate of the future value of the Taj Mahal. *See Christidis v. First Pa. Mortgage Trust*, 717 F.2d 96, 100 (3d Cir.1983) (holding that a complaint with similar deficiencies failed to comply with Rule 9(b)).

the Taj Mahal and the improbability that the Taj Mahal would be successful in such an effort; and 5) the likely effect of the already weakened economy on the future success of the Taj Mahal. Analyzing each in turn, we reject the plaintiffs' contention that theseallegations state actionable securities fraud claims.

A. *Trump's Personal Finances*

We can readily dispose of the plaintiffs' allegation that the prospectus made a material omission in its failure to disclose that Trump's financial condition was "precarious" because he had made or was planning to make various financial guarantees on projects unrelated to the Taj Mahal. Complaint at ¶ 34.[18] The prospectus made

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18. The plaintiffs also alleged that Trump himself made misleading statements and failed to make material disclosures

clear that Trump was only obligated to contribute $75 million of his own funds toward the completion of the Taj Mahal and that he had promised to lend the venture up to $25 million under specified circumstances. It did not even suggest that Trump would contribute more of his personal wealth to the venture in order to repay the bondholders or otherwise to ensure the Taj Mahal's successful completion and operation. Given the explicit limitations on Trump's financial obligations toward the Taj Mahal as well as the fact that he, in fact, contributed the amounts he had promised, we fail to see the materiality of his actions or

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when he, in speaking with the press, denied that he was having financial troubles and boasted about his financial strength and the liquidity of his assets. See Complaint at ¶ 41. Our analysis with respect to the similar alleged omissions in the prospectus equally applies to the allegations concerning these statements.

intentions with respect to the balance of his personal assets.[19]

B. *Average Daily Casino Win*

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19. The prospectus stated that Trump "has advised the Partnership ... that he has sufficient financial resources to perform his obligations.... He has further advised ... that his net worth, determined in accordance with generally accepted accounting principles ..., is at least $500,000,000." If this account accurately portrayed Trump's personal finances, then even after subtracting the amounts of the financial guarantees that the plaintiffs allege Trump made, he would still have retained adequate resources to contribute the $75 million as well as to advance the $25 million loan to the Taj Mahal. The consolidated complaint, however, counters that this $500,000,000 estimate is an exaggerated representation of Trump's personal fortune because it was "based upon artificially inflated appraisals ... [and was] not prepared in accordance with generally accepted accounting principles." Complaint at ¶ 34. We cannot, however, assume this allegation to be true--as is the normal practice under Rule 12(b)(6)--because it is insufficiently specific to satisfy Rule 9(b), which, as we have explained above, *see supra* note 17, applies at least to the claims brought under § 10 and Rule 10b-5. The complaint wholly fails to allege the established accounting practices that the defendants supposedly departed from and the manner in which they supposedly did so. As we mentioned in our discussion of the allegations concerning the AGI Report, *see supra* note 17, under Christidis these defects in a complaint render the fraud allegations insufficiently exact to meet the requirements of Rule 9(b). *See Christidis*, 717 F.2d at 100.

We also reject the plaintiffs' argument that they state an actionable claim through their allegation that the prospectus failed to disclose that, for the Partnership to repay all of its debts, the Taj Mahal would require a $1.3 million average daily casino win. *See* Complaint at ¶ 33(a)-(b). As we discussed above, the prospectus went to great lengths to alert investors to many of the specific risks involved in the successful completion and operation of the Taj Mahal. It clearly conveyed the projected magnitude and enormity of the casino/hotel--the size of which was unprecedented in Atlantic City--and acknowledged that consequently the Taj Mahal's projected cash flow and profitability were highly uncertain. In addition, the prospectus directly related this uncertainty to the indefiniteness of

the Partnership's ability to repay the bonds. With great detail, it also explained the intense competition the Taj Mahal would face in Atlantic City. The prospectus even predicted that, due to the projected increase in casino floor space, the average casino win per square foot would decrease in Atlantic City.

A reasonable investor, having read these cautionary explanations, would understand that the Taj Mahal carried substantial risks. He or she would further comprehend that, because of its size, the Taj Mahal would need to generate a particularly high daily casino win. In other words, an explicit statement in the prospectus that the Taj Mahal demanded an average daily casino win of $1.3 million to meet its debtload would have been superfluous. We therefore hold as a matter of law that

this omission was immaterial and cannot form the basis for a claim under the federal securities laws.

C. *Debt/Equity Ratio*

The plaintiffs furthermore allege that the prospectus failed to disclose that the construction and operation of the Taj Mahal "involved an excessive, unwarranted, and unprecedented debt component relative to total capitalization. Out of the $805 million total projected ... costs, no more than $75 million (or only nine percent) represented capital contributions." Complaint at ¶ 36.

The plaintiffs cannot successfully contend that the prospectus failed to disclose the specifics of the debt-equity ratio. The prospectus set forth the details of the venture's projected debt component with great clarity. It advised

that the Partnership estimated a cost of approximately $805 million to fund the acquisition, completion and operation of the Taj Mahal and to repay the interest on the bonds for fifteen months. It then specifically delineated the several sources for this amount and the magnitude of each source.[20] Thus the prospectus adequately apprised the bondholders that capital contributions (rather than debt obligations) would supply only about nine percent of the Taj Mahal's funds.

In addition, the plaintiffs cannot successfully contend that the prospectus is actionable because it failed to describe its debt-equity ratio as either

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20. The prospectus specified how the Partnership planned to finance the $805 million: $675 million from the sale of the bonds; $75 million from Trump's capital contribution; and $55 million from other sources, including earnings from the investment of the yet unused portion of the bond proceeds and the $25 million Trump was obliged to lend the venture under certain circumstances.

"unwarranted" or "excessive." *See Goldberg v. Meridor*, 567 F.2d 209, 218 n.8 (2d Cir. 1977) ("We do not mean to suggest that § 10(b) or Rule 10b-5 requires insiders to characterize conflict of interest transactions with pejorative nouns or adjectives."), *cert. denied*, 434 U.S. 1069, 98 S. Ct. 1249 (1978). The prospectus disclosed the relevant fact that capital contributions would provide only $75 million of the $805 million budget. And even assuming the Partnership had superior access to such information, the prospectus' failure to compare the Taj Mahal's debt-equity ratio with that of other casinos does not, by itself, create an actionable claim.

The federal securities laws do not ordain that the issuer of a security compare itself in myriad ways to its

competitors, whether favorably or unfavorably, for at least three reasons. First, such a requirement would impose an onerous if not insurmountable obstacle on issuers of securities to ensure they obtain accurate information on all aspects of their competitors which a reasonable investor might find material. Second, were we to announce such a requirement, the likely result would be to inundate the investor with what the Supreme Court disparaged as "an avalanche of trivial information." *TSC*, 426 U.S. at 448, 96 S. Ct. at 2132. Third--and of greatest consequence--it is precisely and uniquely the function of the prudent *investor, not* the issuer of securities, to make such comparisons among investments. *See In re Donald J. Trump Sec. Litig.*, 793 F. Supp. at 559.

Similarly, to the extent that the plaintiffs simply challenge the Partnership's decision to obtain only $75 million in capital contributions in comparison to the approximately $700 million in debt obligations, they plainly do not state a claim under the securities laws. It is well-established that the securities laws do not create liability for breaches of fiduciary duty or mismanagement. *See Santa Fe Indus. v. Green*, 430 U.S. 462, 477, 97 S. Ct. 1292, 1303 (1977). We have held that "[w]here the incremental value of disclosure is solely to place potential investors on notice that management is culpable of a breach of faith or incompetence, the failure to disclose does not violate the securities acts." *Craftmatic*, 890 F.2d at 640. Accordingly, we hold that the plaintiffs' challenges with respect to

the Taj Mahal's debt-equity ratio fail as a matter of law to state a claim under the federal securities laws.

D. *Attracting Customers from Other Casinos*

The plaintiffs also allege that the prospectus failed to disclose that the Taj Mahal would be unlikely to draw away enough customers from other casinos to generate sufficient income for the Partnership to repay its debts. Because the prospectus did in fact warn of the high level of competition for patrons that the Taj Mahal would face, we uphold the district court's decision to dismiss these claims.[21]

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21. With respect to the same topic, the plaintiffs additionally submit that the prospectus did not disclose that the Taj Mahal would have to expend substantial resources to lure patrons to the Taj Mahal and away from competitors, which expenditures would detract from the profits the Taj Mahal could reap from the new customers. This allegation is without merit. The prospectus does in fact describe the marketing strategy which the Partnership planned to utilize to attract

The prospectus explicitly stressed the severity of competition the Taj Mahal would face. It twice stated that "[c]ompetition in the Atlantic City

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customers to the casino. For example, the prospectus reported that the Partnership would promote the Taj Mahal through the use of advertising, complimentary services and promotional programs. In conjunction with the statements concerning the intensity of inter-casino competition, *see supra* at 370-71; *infra* at 376- 77, these disclosures sufficed to inform a reasonable investor that the Taj Mahal would need to spend substantial sums in its efforts to attract patrons from its competitors.

The plaintiffs also invoke the following statement from the prospectus:

> The Partnership believes that the opening of the Taj Mahal [in] the proximity of the Showboat and Resorts Casino Hotel will attract an increased volume of patrons to the vicinity of the Taj Mahal.

Complaint at ¶ 38 (citing Prospectus at 34). It is unclear whether the plaintiffs found an allegation on this statement. In case they wished to allege that this statement is affirmatively and materially misleading because it fails to adjust the increased casino win for increased advertising and promotional expenditures, we note that the prospectus only states that the Taj Mahal's close proximity to other casinos will result in a larger number of customers in the *vicinity* of the Taj Mahal, not that it will result in greater profits for the Taj Mahal itself. Hence it does not advance the plaintiffs' position.

casino/hotel market is intense." In addition, the prospectus specified with particularity the number of casinos in Atlantic City which would compete with the Taj Mahal, and their operators' ongoing and projected efforts to expand their capacity and/or renovate their facilities. The prospectus disclosed that the "Atlantic City casino industry is currently experiencing a significant increase in capacity." It warned that "[t]he Partnership believes that, based upon historical trends, casino win per square foot of casino space will decline in 1990 as a result of a projected increase in casino floor space, including the opening of the Taj Mahal."

The prospectus, moreover, stated flatly: "Growth in Atlantic City casino win is expected to be restrained.... No assurance can be given with respect to

either the future growth of the Atlantic City gaming market or the ability of the Taj Mahal to attract a representative share of that market." Furthermore, the prospectus underscored that the Taj Mahal would compete with other Trump-owned casinos in Atlantic City and with other forms of legalized gambling in the vicinity as well as casino and other gambling in other regions (e.g., Las Vegas). In short, the prospectus extensively and graphically disclosed the magnitude of the competition that the Taj Mahal would face.

The prospectus so bespoke caution with respect to the Taj Mahal's prospective competitive obstacles that we deem the challenged omission immaterial as a matter of law. Because the prospectus took substantial pains to convey to the bondholders the

considerable competition that the Taj Mahal would face in the Atlantic City casino industry, we fail to see how the inclusion of the prediction that the Taj Mahal would have difficulty in surmounting this obstacle successfully would have materially altered the substance of the information provided by the prospectus. *Cf. Craftmatic*, 890 F.2d at 641-44 (dismissing complaint's allegations of material omissions of predictive statements about the likely success of the defendant's effort to enter new lines of business). We therefore conclude that the prospectus adequately cautioned potential investors that the Taj Mahal would face intense competition. These warnings undermine any claim that the prospectus made material omissions on this issue.

E. *Economic Conditions*

Finally we turn to the plaintiffs' allegation that the prospectus "omitted to disclose the likely effect of the already weakened economy in the Northeast and the potential for competition from casinos located in Las Vegas, Nevada." Complaint at ¶ 39. This allegation also fails to state an actionable claim. As mentioned above, *see supra* page ____, the prospectus *did* in fact divulge that the Taj Mahal would face competition from Las Vegas casinos. In addition, we hold that the defendants did not violate the securities fraud laws merely by failing to alert investors to the obvious implications of the already weakened economic conditions in the Northeast. As the reasonable investor should have known of the economic downturn in the Northeast at that time, the inclusion of this information would not have substantively

altered the total mix of information the prospectus provided to investors. The federal securities laws, in a word, do not compel the Partnership to state the obvious.

VI. *Conclusion*

For the foregoing reasons we will affirm the orders of the district court dismissing the plaintiffs' complaints under Rule 12(b)(6). In view of our disposition of the plaintiffs' federal causes of action, we will also affirm the district court's dismissal without prejudice of the plaintiffs' state law claims for lack of pendent jurisdiction.

In re DONALD J. TRUMP CASINO SECURITIES LITIGATION--Taj Mahal Litigation.
MDL 864 (JFG). Civ. A. No. 90-0919.
United States District Court,
D. New Jersey.
Filed: June 2, 1992.

APPEARANCES:

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Carl D. Poplar, Cherry Hill, N.J., Liaison Atty. for plaintiffs.

John J. Barry, Clapp & Eisenberg, P.C., Newark, N.J., Richard L. Posen, Wilkie Farr & Gallagher, New York City, for the Trump Defendants.

Stuart J. Baskin, Shearman & Sterling, New York City, for Merrill, Lynch, Pierce, Fenner & Smith, Inc., defendant.

OPINION

GERRY, Chief Judge.

The parties are presently before the court upon motion of defendants Donald J. Trump, Robert S. Trump, Harvey S. Freeman, The Trump Organization Inc., Taj Mahal Funding Inc., Trump Taj Mahal Inc.,

and Trump Taj Mahal Associates Limited (collectively "the Trump defendants") and defendant Merrill, Lynch, Pierce, Fenner and Smith ("Merrill Lynch") for dismissal with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons expressed herein, defendants' motion is granted.

BACKGROUND

The Taj Mahal ("the Taj") is a hotel/casino located on the boardwalk in Atlantic City, New Jersey. The project was initiated by Resorts International, Inc. ("Resorts") but was later sold to the Trump defendants. In 1988, as the primary source of funding for the Taj, the Trump defendants offered and Merrill Lynch underwrote $674 million in 14% first mortgage investment bonds ("the bonds"). The bonds were issued pursuant to a prospectus dated November 9, 1988 ("the prospectus").

After learning that the Taj intended to file Chapter 11 bankruptcy and establish a reorganization plan, various bondholders filed separate complaints in the Southern District of New York, the Eastern District of New York, and the District of New Jersey, alleging essentially similar claims that the prospectus included misrepresentations and omissions which violated federal securities fraud laws. The complaints were consolidated in multi-district litigation in this court. Plaintiffs await class certification.

In May, 1991, the parties reached a tentative settlement agreement, memorialized in a "Memorandum of Understanding" ("MOU"). The MOU provided for plaintiffs to conduct "confirmatory discovery" to determine whether they believed the settlement to be a fair

disposition of the case. In October 1991, the plaintiffs returned from confirmatory discovery seeking to cancel the settlement deal. Defendants moved before this court for an order allowing them to solicit approval by the plaintiff class of the proposed settlement, over the objections of all plaintiffs' counsel. We denied that motion in a memorandum opinion and order dated November 15, 1991. This motion to dismiss, filed jointly by the Trump defendants and Merrill Lynch, followed.

THE COMPLAINT

Count one of plaintiffs' complaint alleges that the prospectus "contained untrue statements of material facts and omitted to state material facts required to be stated therein which were necessary to make the statements therein not misleading," in violation of sections 11,

12(a) and 15 of the Securities Act of 1933. Count two alleges fraud in the prospectus in violation of sections 10(b) and 20(b) of the Exchange Act of 1934, and Rule 10b-5 promulgated thereunder. Count two also alleges, as part of the securities fraud claim, that the prospectus contained false and misleading information.

Count three, a breach of fiduciary duty claim, is lodged only against defendant Donald Trump. Count four is a common law false advertising claim. Counts three and four present solely state law claims, which depend for their survival on this court retaining jurisdiction over the federal securities claims.

THE PROSPECTUS[1]

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1. Although challenging the prospectus directly, plaintiffs failed to attach a copy of it to their complaint. Indeed,

The prospectus is a lengthy, detailed document. On the first page this notice appears in bold print: "See 'Special Considerations' for a discussionof certain factors to be considered by potential investors." There follows a section entitled "PROSPECTUS SUMMARY" which notes inter alia that "[u]pon completion, the Taj Mahal will be the largest casino/hotel facility in Atlantic City." Prospectus,

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plaintiffs did not even reference page numbers of the portions of the prospectus quoted or challenged in the complaint. Defendants have submitted a complete copy of the prospectus on this dismissal motion, and argue that we should consider it even though plaintiffs failed to attach it to their pleading, despite the fact that 12(b)(6) motions to dismiss are to be limited to matters raised in the pleadings. We agree, and "decline to close our eyes to the contents of the prospectus and to create a rule permitting a plaintiff to evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the prospectus to the complaint or to incorporate it by reference." I. Meyer Pincus & Assoc. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991). See also Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 n.3 (1st Cir. 1991). Accordingly, we will consider the prospectus together with the pleadings on this motion.

at 3.[2] Included in the prospectus summary is a synopsis of the Special Considerations section:

Special Considerations

> There are special considerations associated with an investment in the Bonds. These special considerations include, among others, the ability of thePartnership to service its debt; the validity of the security of the Bonds; the possible effect of applicable fraudulent conveyance statutes; the risks regarding completing and opening the Taj Mahal; the terms of the Trump Completion Guaranty; potential conflicts of interest; competition; limitation of liability; management of the Taj Mahal; certain regulatory matters, including matters affecting ownership of the Bonds; absence of a public market for the Bonds; the maintenance of insurance; and the appraisals of the Taj Mahal.

Prospectus at 4. The "Special Considerations" section opens with the following notice, in italicized print:

> Before making a decision to purchase any of the Bonds, prospective

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2. This statement is repeated at page 31 of the prospectus.

> purchasers should consider carefully **the following factors,** among others set forth in this Prospectus, which **could materially adversely affect** (i) the operations of the Partnership and **its ability to make necessary payments to the Company to meet the debt service requirements of the Bonds** and (ii) the security for the Bonds.

Prospectus at 8 (emphasis added). Each special consideration listed in the "Special Considerations" synopsis constitutes a subject matter heading under the "Special Considerations" section, and is explained in considerable detail there.

Following the "Special Considerations" section is the meat and potatoes of the prospectus, "Management's Discussion and Analysis of Financial Conditions and Results of Operations of the Partnership and the Company" ("Management's Discussion"). The entire prospectus is replete with cross-references directing potential

investors to related portions of the prospectus.

DISCUSSION

I. Standards on Motion to Dismiss

A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). We must accordingly consider the factual allegations of the complaint as true, construe them liberally, and draw all reasonable inferences in plaintiff's favor. See Unger v. National Residents Matching Program, 928 F.2d 1392 (3d Cir.1991); Glenside West Corp. v. Exxon Co., U.S.A., Div. of Exxon Corp., 761 F. Supp. 1100 (D.N.J. 1991); Gutman v.

Howard Sav. Bank, 748 F. Supp. 254 (D.N.J. 1990); Leaty v. U.S., 748 F. Supp. 268 (D.N.J. 1990). If, applying these standards, plaintiffs cannot state an actionable claim, the complaint must be dismissed.

We take this occasion to comment on the extent to which this court may consider matters outside the pleadings on a 12(b)(6) motion to dismiss. In opposing defendants' motion, plaintiffs have submitted considerable materials, including affidavits, deposition transcript excerpts, and an appraisal report, accompanied by an identifying affidavit. Plaintiffs urge that we may consider these materials, which are clearly matters outside the pleadings, without converting the 12(b) motion into a Rule 56 motion for summary judgment. We disagree.

Plaintiffs rely on Swinn Resource Systems v. Lycoming County, 883 F.2d 245, 247 (3d Cir. 1989), cert. denied, 493 U.S. 1077, 110 S. Ct. 1127 (1990), for the proposition that extraneous materials that "fall within the ambit of the complaint" may be considered on a motion to dismiss. In fact, in Swinn the extraneous material considered--a deposition--was attached tothe complaint at the time of filing. Plaintiffs here attached no materials, not even the prospectus, to their complaint. The depositions and other materials they now urge us to consider as falling within the ambit of the complaint were never submitted to this court until plaintiffs opposed the current motion. We do not think that these materials fall within the ambit of the complaint, as courts in

this circuit have used that phrase.[3] The materials which plaintiffs urge us to consider are the stuff of summary judgment motions, not motions to dismiss under 12(b)(6).

II. Choice of Law

A threshold question is which circuit's law should be applied to judge the actionability of the prospectus. Although the case has been consolidated in this district, within the Third Circuit, the underlying cases come not only from this district but also from the Southern District of New York and the Eastern District of New York, both within

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3. For example, citing Swinn, the court in In re Bell Atlantic Corporation Securities Litigation, 1991 U.S.Dist. LEXIS 15874 (Oct. 10, 1991), considered "documents attached to the complaint, in addition to memoranda and briefs" in deciding a motion to dismiss.

the Second Circuit.[4] The question to be decided is whether the law of the Third or Second Circuit controls our decision.

In a case consolidated under 28 U.S.C. § 1407, the law of the transferor forum must be given "close consideration," but the law of the transferee forum ultimately controls. In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987).

> The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit.

Id. Accordingly, the law of the Second Circuit must be given close consideration

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4. We note that Merrill Lynch is a defendant only in cases filed within the Second Circuit.

here, but does not have stare decisis effect. As defendants point out, we are faced with a relatively blank slate on certain crucial issues in the Third Circuit, while we are well-instructed on those issues by the Second Circuit and other circuits as well.

III. The Federal Securities Fraud Claims

The complaint essentially sets forth claims under section 11(a) of the Securities Act of 1933, as amended, 15 U.S.C. § 77k(a); and section 10(b) the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78j(b), and rule 10b-5 promulgated thereunder.[5] The crux

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5. Section 11(a), 15 U.S.C. § 77k(a) provides in pertinent part:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security [may bring suit against]

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(1) every person who signed the registration statement;

(2) every person who was a director of ... or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted; ...

(5) every underwriter with respect to such security.

Section 10(b), 15 U.S.C. § 78j(b) provides in pertinent part:

It shall be unlawful for any person, directly or indirectly ...

(b) to use or employ, in connection with the purchase or sale of any security ..., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, promulgated pursuant to section 10(b), provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality ...

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

of ~~our~~ analysis is whether the complaint adequately alleges that the prospectus contained material false and misleading statements or omissions.

The complaint alleges misrepresentations with respect to three general aspects of the prospectus: the defendants' ability to service the debt on the bonds; the competition which the Taj Mahal would face; and the appraisals relied upon by defendants in valuing the Taj. All these aspects deal with future projections or forecasts. The complaint further alleges misrepresentations about the state of Donald Trump's "financial empire," contained both in the prospectus and in various media sources.

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

In support of dismissal, defendants argue that the prospectus so "bespeaks caution" that the statements and omissions specified in the complaint are not actionable. Plaintiffs respond that no amount of cautionary language can render a false or misleading omission or a fraudulent misrepresentation not actionable; that the complaint adequately alleges such omissions and misrepresentations; and that the complaint therefore states claims of securities fraud sufficient to withstand a motion to dismiss.[6]

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6. Defendants have argued various alternative grounds for dismissal, specifically that the complaint fails to satisfy the fraud pleading requirements of Fed.R.Civ.P. 9(b); that it fails to properly plead the statute of limitations; and that it fails to adequately plead reliance on the alleged misrepresentations, an essential element to recovery under sections 11 and 10b. Because we dispose of the motion on the "bespeaks caution" and other related bases, we do not reach these alternative arguments.

IV. The "Bespeaks Caution" Approach to Federal Securities Fraud Claims

We examine first the "bespeaks caution" doctrine relied upon by defendants. The essence of the doctrine is that where an offering statement, such as a prospectus, accompanies statements of its future forecasts, projections and expectations with adequate cautionary language, those statements are not actionable as securities fraud. Within the past thirteen months, five circuit courts have adopted this approach to evaluating the actionability of a federal securities fraud claim based on future projections contained in a prospectus or other offering statement. See Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 (1st Cir. 1991); I. Meyer Pincus & Associates v. Oppenheimer & Co., Inc., 936 F.2d 759, 763 (2d Cir. 1991); Sinay v. Lamson & Sessions Co., 948 F.2d 1037,

1040 (6th Cir. 1991); Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 949 F.2d 243, 245-46 (8th Cir. 1991); In re Convergent Technologies Securities Litigation, 948 F.2d 507, 516 (9th Cir. 1991). Because the trend in the law heavily favors this approach, a comprehensive examination of it is warranted.

A. Origins of the "Bespeaks Caution" Approach

The "bespeaks caution" formula was first devised in Polin v. Conductron Corp., 552 F.2d 797 (8th Cir. 1977), a shareholder suit alleging securities fraud based on allegedly false and misleading statements in proxy statements, annual reports, and other documents. In affirming a judgment on the merits for defendants after trial, the Polin court held that the terminology employed in an annual report,

specifically that results were " 'expected' to show improvement" and that there was "a 'possibility' of a break-even soon," were terms which "bespeak caution in outlook and fall far short of the assurances required for a finding of falsity and fraud." Id., 552 F.2d at 806, n.28.

Subsequently, the Second Circuit decided Luce v. Edelstein, 802 F.2d 49 (2d Cir. 1986), a case generally regarded as seminal. The court in Luce found that while some of plaintiffs' allegations were sufficient to state a claim for relief under section 10(b), including allegations that defendants made promises which they knew at the time to be false, other allegations of intentional misrepresentation as to the potential success of the defendant partnership could not survive a motion to dismiss.

The challenged statements at issue were specifically addressed by cautionary language:

> the Offering Memorandum made it quite clear that its projections of potential cash and tax benefits were "necessarily speculative in nature" and that "[n]o assurance [could] be given that these projections [would] be realized." Indeed, the Offering Memorandum warned prospective investors that "[a]ctual results may vary from the predictions and these variations may be material." We are not inclined to impose liability on the basis of statements that "bespeak caution."

Id. at 56 (emphasis added). The Luce court relied on Polin for this proposition.

District courts in the Second Circuit have followed the Luce "bespeaks caution" approach consistently. See e.g., Haggerty v. Comstock Gold Co., L.P., 765 F. Supp. 111, 114 (S.D.N.Y. 1991); CL-Alexanders Laing & Cruickshank v. Goldfeld, 739 F. Supp. 158, 162 (S.D.N.Y. 1990) (with respect to future

projections, no liability under section 10b for statements that "bespeak caution"); Brown v. E.F. Hutton Group, 735 F. Supp. 1196, 1201-02 (S.D.N.Y. 1990); Friedman v. Arizona World Nurseries Limited Partnership, 730 F. Supp. 521, 541 (S.D.N.Y. 1990) (warnings and disclaimers limit degree to which investors may reasonably rely on offering document as forecast of future performance), aff'd without opinion, 927 F.2d 594 (2d Cir. 1991); O'Brien v. National Property Analysts Partners, 719 F. Supp. 222, 227 (S.D.N.Y. 1989); Stevens v. Equidyne Extractive Industries 1980, Petro/Coal Program 1, 694 F. Supp. 1057, 1063 (S.D.N.Y. 1988) (no liability attaches to offering memorandum purporting to be speculative); Feinman v. Schulman Berlin & Davis, 677 F. Supp. 168, 171 (S.D.N.Y. 1988) (no reasonable

reliance where offering document informed that estimates were speculative).

Luce v. Edelstein also has been cited with approval by this court. In In re National Smelting of New Jersey, Inc. Bondholders' Litigation, 722 F. Supp. 152, 171 (D.N.J. 1989) (Gerry, C.J.), this court relied on Luce in granting summary judgment in favor of a third-party defendant accounting firm in a false and misleading prospectus case:

> In a similar situation, the Second Circuit Court of Appeals in Luce v. Edelstein refused to find 10(b) liability to the authors of an offering memorandum, which had "warned prospective investors that '[a]ctual results may vary from the predictions and these variations may be material.' " The court, speaking through Judge Winter, stated: "We are not inclined to impose liability on the basis of statements that clearly bespeak caution."

Id. at 171 (citations omitted). The language at issue in that portion of National Smelting contained the following

warning: "It is usually the case that one or more of the assumptions in a forecast do not materialize because events and circumstances do not occur as expected. Therefore, the actual results during the forecast period will differ from theforecasted results; the differences may be material." Id.[7]

B. Recent Developments in the "Bespeaks Caution" Approach

Most recently, the First, Second, Sixth, Eighth and Ninth Circuit Courts of

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7. National Smelting is the only case in this circuit which has applied Luce and the "bespeaks caution" doctrine. Only one other case in this circuit has referred to the "bespeaks caution" approach of Luce v. Edelstein. See Fitch v. Radnor Industries, Ltd., 1990 U.S. Dist LEXIS 13023 (E.D. Pa. October 2, 1990). In Fitch, the court referred to Luce but did not reach application of it because the court found dismissal warranted on Rule 9(b) grounds of inadequately plead fraud.

Appeals have explicitly adopted the "bespeaks caution" approach to securities fraud claims.[8] In Romani v. Shearson Lehman and Hutton, the plaintiffs had alleged that defendants fraudulently induced them into investing in a horse-breeding farm "through misrepresentations and omissions in the offering materials that falsely inflated the partnership's financial potential." Romani, 929 F.2d at 876. Plaintiffs claimed that several material adverse facts were deliberately withheld by

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8. The Third Circuit has yet to consider the issue. Plaintiffs have argued that a Third Circuit case, Herskowitz v. Nutri/System, 857 F.2d 179, 185 (3d Cir. 1988), "rejects" the "bespeak caution" argument relied upon by defendants. However, Herskowitz never addressed the "bespeaks caution" approach and therefore could not have and did not reject it. Moreover, in Herskowitz the truth or falsity of an expert opinion was at issue, rather than management's forecasts and predictions. The analysis for each is necessarily different, because the latter deals merely with speculation as to future events and results, conditioned on factors of uncertain resolution, rather than existing factual information.

defendants from the prospectus. The First Circuit, however, placed dispositive weight on this statement in the prospectus: "[t]here can be no assurance that the investment objectives of the Partnership will be obtained." Id. at 879. This directly led the court to hold that "although the offering materials were optimistic about the prospects for [the business enterprise], the documents unquestionably warned potential investors in a meaningful way that economic conditions in the horse-breeding industry were uncertain. Documents such as this, which 'clearly "bespeak caution," ' are not the stuff of which securities fraud claims are made...." Id.

Similarly, in I. Meyer Pincus & Associates v. Oppenheimer & Co., the Second Circuit "declined to impose

liability" on the basis of "statements contained within the prospectus [which] clearly 'bespeak caution,' rather than encouraging optimism." The court accordingly ruled that the language of the prospectus, "when read in context, is not materially misleading." I. Meyer Pincus, 936 F.2d at 763. The court also considered important the fact that "the first sentence of the Prospectus Summary, which states that the summary 'is qualified in its entirety by reference to the more detailed information included elsewhere in the prospectus,' unambiguously communicates the importance of reading all relevant material contained within the prospectus." Id. (Emphasis added.)

In Sinay v. Lamson & Sessions Co., the Sixth Circuit affirmed the dismissal of an action alleging securities fraud

under a fraud-on-the-market theory. Citing Polin, the Sinay court held specifically that "[e]conomic projections are not actionable if they bespeak caution." Sinay, 948 F.2d at 1040. The court continued,

> [i]n determining whether the statements are actionable, the court must scrutinize the nature of the statement to determine whether the statement was false when made. While analyzing the nature of the statement, the court must emphasize whether the "prediction suggested reliability, bespoke caution, was made in good faith, or had a sound factual or historical basis."

Id. (Citations omitted.) Applying this standard, the court held that the "questioned statements herein were phrased with sufficient cautionary language." Id. Indeed, each challenged statement was accompanied or addressed by "cautionary language." Additionally, the Sinay court cited to the proposition that "fraud by hindsight," the attempt to

impose liability on management for unrealized economic predictions, is not actionable. Id., citing Schwartz v. Novo Industri, A/S, 658 F. Supp. 795, 799 (S.D.N.Y. 1987).

The Eighth Circuit reinforced its position on the "bespeaks caution" doctrine when it affirmed summary judgment for defendants in Moorhead v. Merrill Lynch. Plaintiffs in Moorhead had brought a securities fraud claim for alleged misrepresentations in a bond offering statement. They argued that defendant had "made misrepresentations, omitted material facts and made economic predictions with reckless disregard for their validity," urging the appeals court to reverse the finding that any misrepresentations or omissions were disclosed by specific cautionary language in the challenged document. Moorhead, 949

F.2d at 245. However, in affirming the district court's holding, the appeals court agreed that "plaintiffs could not base a federal securities fraud claim on any misrepresentation or omission in the feasibility study which was addressed by the repeated, specific warnings of significant risk factors and the disclosures of underlying factual assumptions also contained therein." Id. at 245-46. The cautionary language considered by the Moorhead court included the following:

> We believe that the underlying assumptions provide a reasonable basis for management's forecast. However, some assumptions inevitably will not materialize and unanticipated events and circumstances may occur; therefore, the actual results achieved during the forecast periods will vary from the forecast and the variations may be material. The accompanying financial forecast indicates that sufficient funds will be generated to meet [expenses], including the debt service requirements.... However, the achievement of any

> financial forecast is dependent upon future events, the occurrence of which cannot be assured.

Id., 949 F.2d at 246 n. 2 (emphasis added). The document also contained several other examples of "no representations or assurances can be made" language. Id.

Finally, the Ninth Circuit joined in adopting the "bespeaks caution" approach. The court in In re Convergent Technologies highlighted the importance of viewing the challenged statements in context, noting that "to prevail, the plaintiffs must demonstrate that a particular statement, when read in light of all the information then available to the market, or a failure to disclose particular information, conveyed a false or misleading impression." Convergent Technologies, 948 F.2d at 512 (emphasis added). Plaintiffs in Convergent

Technologies had argued that it was a violation of securities fraud laws for defendants to omit internal corporate projections from the offering statement. However, in affirming summary judgment, the court relied on Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1221 (9th Cir. 1980), which held that "[i]t is just good general business practice to make such projections for internal corporate use. There is no evidence, however, that the estimates were made with such reasonable certainty even to allow them to be disclosed to the public." Convergent Technologies at 516 (emphasis in original). Additionally, regarding cautionary language, the court found that the challenged prospectuses "provided more than generalized statements of risk." Id. These included statements that future success was dependent on

several enumerated factors of uncertain result, warnings of "unanticipated problems" down the line, and notice that plaintiffs were investing in a new, untried venture. Id.

C. Considerations in Adopting the "Bespeaks Caution" Approach

Plaintiffs respond to this body of securities fraud law by arguing that the only question properly before this court on a motion to dismiss is whether the complaint alleges false and misleading statements or omissions, or misrepresentations. They argue that they have adequately pled such claims, and that the cautionary language in the prospectus cannot insulate defendants from liability or preclude plaintiffs from stating a cognizable claim.

Plaintiffs are correct in stating that a "projection that is issued without a reasonable basis is an untrue statement

and actionable under § 10(b) and Rule 10b-5 if made knowingly or recklessly." In re Craftmatic Securities Litigation, 890 F.2d 628, 645-46 (3d Cir. 1989); Eisenberg v. Gagnon, 766 F.2d 770, 776 (3d Cir.), cert. denied, 474 U.S. 946 (1985); Urbach v. Sayles, 779 F. Supp. 351, 355 (D.N.J. 1991) ("projections or estimates can ground a fraud claim under the securities laws"). The same is true for section 11 claims. The Supreme Court hasrecently confirmed that "statements of reasons, opinion or belief" regarding projections are actionable under the securities fraud provisions. See Virginia Bankshares, Inc. v. Sandberg, 111 S.Ct. 2749, 2758 (1991).

However, defendants maintain that a prospectus which "bespeaks caution" displaces a misrepresentation claim. They argue that the securities fraud laws

are concerned with management's disclosure, not management's business judgment; and that so long as full disclosure is made, unrealized future projections cannot be actionable as securities fraud.

Thus, we must determine which comes first in our consideration of this case: the cautionary language of the prospectus, or the allegations of misrepresentations in the complaint. If any allegation of falsity or misrepresentation can survive a motion to dismiss, then language in a prospectus which "bespeaks caution" as to future forecasts is irrelevant. However, if adequate cautionary language in a prospectus is the equivalent of full disclosure pertaining to forecasts and predictions, relieving defendants of securities fraud liability, then

plaintiffs' claims are not actionable. In essence, the "bespeaks caution" analysis would subsume or obviate the analysis regarding adequate allegations of falsity or misrepresentation.

We think that the latter view is precisely how the "bespeaks caution" doctrine should be applied. As the Eighth Circuit has held, "plaintiffs could not base a federal securities fraud claim on any misrepresentation or omission in the feasibility study which was addressed by the repeated, specific warnings of significant risk factors and the disclosures of underlying factual assumptions also contained therein." Moorhead, 949 F.2d at 245-46 (emphasis added). In considering whether a complaint states a claim under either section 10(b) or section 11, "we examine the prospectus together with the

allegations contained on the face of the complaint." I. Meyer Pincus, 936 F.2d at 762. Thus, the allegations of the complaint are not read in isolation; they cannot be separated from the text of the prospectus, including whatever cautionary language appears in that text.

Moreover, "[i]n determining whether the statements are actionable, the court must scrutinize the nature of the statement to determine whether the statement was false when made. While analyzing the nature of the statement, the court must emphasize whether 'the prediction suggested reliability, bespoke caution, was made in good faith, or had a sound factual or historical basis.' " Sinay at 1040 (quoting Isquith v. Middle South Utils., Inc., 847 F.2d 186, 204 (5th Cir.), cert. denied, 488 U.S. 926 (1988) (emphasis added). Thus, whether

an offering statement such as a prospectus "bespeaks caution" is directly relevant to whether it is actionable. Indeed, the court "must emphasize" whether a statement "bespoke caution," id., indicating that such a factor is at the least a powerful consideration and may even be dispositive.

Thus, the "bespeaks caution" approach answers in a dispositive way a misrepresentation claim. The "bespeaks caution" analysis subsumes the misrepresentation analysis. No reasonable inference can be drawn in favor of a plaintiff that a document or statement which bespeaks caution as to future forecasts contains actionable misrepresentations.

This approach is also consistent with the current state of Third Circuit law in this area. Under Craftmatic, a

statement issued without a reasonable basis is untrue "if made knowingly or recklessly." Craftmatic, 890 F.2d at 646 (emphasis added). A statement accompanied by language which "bespeaks caution" cannot be said to have been made "recklessly." Thus, it is necessary first to consider the cautionary language of a prospectus, and to consider the challenged statements in context, in determining whether a complaint alleges actionable omissions or misrepresentations.

Plaintiffs also urge us to refrain from following the guidance of Luce and other similar cases, relying for this argument on Griffen v. McNiff, 744 F. Supp. 1237, 1253-54 (S.D.N.Y. 1990), and Landy v. Mitchell Petroleum Technology Corp., 734 F. Supp. 608, 619 (S.D.N.Y. 1990). Plaintiffs maintain that these

cases rejected the "bespeaks caution" approach. In fact, Griffen and Landy did not reject that approach. They merely distinguished the facts before them from those at issue in Luce and other cases which applied the "bespeaks caution" analysis to find a claim not actionable. The Griffen court even acknowledged that

> warnings and disclaimers may limit the extent to which an investor can rely on the offering documents as a forecast of future events. Dismissal of securities fraud claims may be appropriate where the offering documents specifically warn plaintiffs not to rely on the alleged misrepresentations made by defendants, thus making any subsequent reliance unjustified.

Griffen, 744 F. Supp. at 1253. Thus, plaintiffs' argument that these two cases preclude our application of the "bespeaks caution" doctrine must fail.

Plaintiffs also contend that, were this court to allow statements such as "no assurances can be given" to relieve

defendants of liability, "the securities laws would cease to have any practical effect." They appeal to our sense of "fairness," contending that "[i]t is admirable to bespeak caution. It is required to bespeak the whole truth. Describing an investment as speculative is not a license to misrepresent material facts."

This is a misreading of the "bespeaks caution" approach, and indeed of the policies behind the securities fraud laws themselves. The "bespeaks caution" approach demands far more than merely describing an investment as speculative. It neither immunizes fraud nor nullifies the securities fraud protections of sections 11 and 10b. These laws are intended to ensure that investors have all the information they need in order to make educated investment

decisions. We think that the "bespeaks caution" doctrine is itself an endorsement of that fundamental concept of the securities laws, the touchstone of which is disclosure.

We do note the troubling possibility that the "bespeaks caution" doctrine will encourage management to conceal deliberate misrepresentations beneath the mantle of broad cautionary language. It is for this reason that the "bespeaks caution" doctrine applies only to precise cautionary language which directly addresses itself to future projections, estimates or forecasts in a prospectus. A blanket warning that the within investment is "risky," for example, would be insufficient to ward against a federal securities fraud claim. Nor would our holding here apply to cautionary language regarding actual facts, such as past

performance of an existing investment or the contents of appraisals or other expert reports referenced in the prospectus.

Having established the legal framework in which to analyze the prospectus at issue here, we now turn to apply that framework.

V. Plaintiffs' First Claim--The Ability of Partnership to Service the Debt on the Bonds

Plaintiffs' primary complaint is that defendants did not have a reasonablebasis for believing that it could service the debt on the bonds, and that defendants made various omissions or misrepresentations with respect to their ability to do so. We therefore begin by perusing the portions of the prospectus which relate to this claim.

A. The Prospectus

The "Special Considerations" section discussed supra contains several cautionary sub-sections, the first of which is entitled "Ability of the Partnership to Service Debt." This sub-section includes the following cautionary language:

> Upon consummation of the offering of the Bonds, the Partnership will have outstanding indebtedness in the aggregate principal amount of $675,000,000.... The casino business in Atlantic City, New Jersey has a seasonal nature of which summer is the peak season. The anticipated opening date of the Taj Mahal is on or about February 15, 1990. Since the third interest payment date on the Bonds occurs before the summer season, the Partnership will not have the benefit of receiving peak season cash flow prior to the third interest payment date, **which could adversely affect its ability to pay interest on the Bonds**.
>
> The sole business of the Partnership will be to acquire, construct and operate the Taj Mahal and its ancillary facilities. **The Taj Mahal has not been completed and, accordingly, has** no operating history. The Partnership, therefore, has **no history of**

> **earnings and its operations will be subject to all of the risks inherent in the establishment of a new business enterprise. Accordingly, the ability of the Partnership to service its debt to the Company is completely dependent upon the success of that operation and such success will depend upon financial, business, competitive, regulatory and other factors affecting the Taj Mahal and the casino industry in general, as well as prevailing economic conditions.** See "Capitalization" and "Business of the Partnership."
>
> **The Taj Mahal will be the largest casino/hotel complex in Atlantic City**, with approximately twice the room capacity and casino space of many of the existing casino/hotels in Atlantic City. Neither the Partnership nor any other casino/hotel operator has had experience operating a complex the size of the Taj Mahal in Atlantic City. Consequently, **no assurance can be given that, once opened, the Taj Mahal will be profitable or that it will generate cash flow sufficient to provide for the payment of the debt service on the Note** and/or any future borrowings by the Partnership.

Prospectus at 8 (emphasis added).

The next sub-section in "Special Considerations," entitled "Security for

the Bonds," contains the following pertinent statements:

> If an Event of Default occurs prior to completion of the Taj Mahal, uponforeclosure and sale of the Collateral, there would not be sufficient proceeds to pay the principal of, and accrued interest on, the Bonds.... In addition, **if an Event of Default occurs with respect to the Bonds after completion of the Taj Mahal, there can be no assurance that the liquidation of the Collateral would produce proceeds in an amount which would be sufficient to pay the principal of, and accrued interest on, the Bonds.** See "Description of the Bonds--Security" and "--Non-recourse."
>
> In any foreclosure sale of the Taj Mahal, the purchaser would need to be licensed to operate the Taj Mahal under the New Jersey Casino Control Act and the regulations promulgated thereunder.... Because potential bidders must satisfy such requirements, **the number of potential bidders in a foreclosure sale would be less than in foreclosures of other types of facilities and such requirements may delay the sale of, and may adversely affect the sales price for, the Taj Mahal.** The ability to repossess and dispose of the Collateral upon acceleration of the Bonds is likely to be significantly impaired or delayed by applicable bankruptcy law

> if a bankruptcy case were to be commenced by or against the Partnership prior to the repossession or disposition of the Collateral by the Trustee or the Bondholders.

Prospectus at 9 (emphasis added).

Following the "Special Considerations" section is the "Management's Discussion" portion of the prospectus. It states in pertinent part that:

> After the completion and opening of the Taj Mahal, the Partnership will rely on cash generated from the Taj Mahal's operations to service its debt and provide for anticipated capital requirements. **The Partnership believes that funds generated from the operation of the Taj Mahal will be sufficient to cover all of its debt service (interest and principal). No assurance can be given, however, that actual operating results will meet the Partnership's expectations.** See "Special Considerations--Ability of the Partnership to Service Debt" and "Special Considerations--Risks Regarding Completing and Opening the Taj Mahal--Consequences of Delay."

Prospectus at 28 (emphasis added). These excerpts represent the portions of the prospectus implicated by plaintiffs' challenge that defendants violated federal securities laws by failing to inform that the partnership could not service its debt. We must examine them in light of the law set forth supra, in order to determine whether plaintiffs have stated a claim upon which relief maybe granted.

B. Application of the "Bespeaks Caution" Approach

The heart of plaintiffs' claim is that defendants possessed no reasonable basis for the statement in the prospectus that they believed the Taj could generate sufficient funds to cover all the debt service on the bonds. They base this claim on one sentence buried in the middle of the prospectus: "The Partnership believes that funds generated

from the operation of the Taj Mahal will be sufficient to cover all of its debt service (interest and principal)." Plaintiffs have extracted one lone statement from this comprehensive document and attempted to persuade the court that standing alone and read out of context it is sufficient to state a federal securities fraud claim. We are not so persuaded.

The above-quoted language from the prospectus is a striking example of a document which truly "bespeaks caution." Indeed, this prospectus " 'virtually bristle[s] with warnings' as to the extremely risky nature of the investment described herein, as well as the highly speculative nature of the memoranda's projections as to future results." Haggerty, 765 F. Supp. at 115 (quoting

CL-Alexanders Laing, 739 F. Supp. at 162).

In stating their "no reasonable basis" claim, plaintiffs have utterly disregarded the entire "Special Considerations" section of the prospectus, as well as the language immediately following the challenged statement, which reads: "No assurance can be given, however, that actual operating results will meet the Partnership's expectations." Thus, plaintiffs have attempted to base their case on a statement which is in fact directly addressed by specific, cautionary language throughout the prospectus and immediately following the challenged statement.

Plaintiffs have failed to confront the fact that the context of an allegedly false and misleading statement is a

crucial consideration. The actionability of an isolated statement in a challenged prospectus depends upon its framework. This is as true in a "bespeaks caution" case as in any other securities fraud case. Solitary statements alone cannot support a federal securities law claim when read out of context. See, e.g., TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (in section 14a proxy statement case, materiality is determined by the "total mix" of information available to the investor); I. Meyer Pincus, 936 F.2d at 763; Convergent Technologies, 948 F.2d at 512. Here the context fairly screams caution. As a matter of law, we find that no reasonable investor could have been misled by the sole sentence, buried in the middle of the prospectus and preceded by pages of pertinent warnings, which

plaintiffs claim was misleading. Ultimately, the text of the prospectus itself shields defendants from liability, for it is a carefully crafted, fully disclosing document.

In Moorhead, a case factually similar to this case, the district court rejected plaintiffs' federal securities fraud claim because the challenged document "contained a number of risk statements, detailed cautionary language and disclosures about the underlying economic assumptions, any of which could have affected [management's] ability to pay back the bonds." Moorhead, 949 F.2d at 245. We think that the case at bar is no different. Such inclusions speak directly to the reasonable basis of management's beliefs. Certainly management is not required to offer investments pursuant to a prospectus

which disparages the very viability of that investment.

In fact, the prospectus does set forth the basis for management's "belief" in its ability to meet the debt service: the AGI Report, the appraisal of the future worth of the Taj. Plaintiffs allege that this appraisal itself was made without a "reasonable basis," and therefore management's reliance on it also has no reasonable basis. However, we find that this attenuated linkage cannot support a claim of securities fraud.

In attempting to distinguish Romani, I. Meyer Pincus, Sinay, Moorhead and Convergent Technologies, plaintiffs argue that while the alleged misrepresentations in those cases were directly contradicted by disclaimers, the same is not true in this case. Upon close inspection of the

prospectus here, we cannot agree. If anything, this prospectus includes even more specifically tailored disclaimers directly addressing each challenged statement, than did the offering materials at issue in those five appellate decisions. This distinction must therefore be rejected.[9]

C. Fraud by Hindsight

We are wary, too, of the dangers raised by claims of "fraud by hindsight." Monday morning quarterbacking cannot present actionable securities fraud claims. "The fact that a projection or estimate turned out to be incorrect,

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9. Plaintiffs have impliedly argued that the facts of this case are more closely analogous to those in Griffen and Landy, which refused to apply Luce, than to those in the five recent appellate decisions. We disagree. The court in Griffen and Landy refused to apply the cautionary language approach because the alleged misrepresentations atissue were not directly contradicted by any cautionary language. That is in no way similar to the case at bar.

standing alone, does not even raise an inference that the statement was fraudulent when made." Urbach v. Sayles, 779 F. Supp. 351, 358 (D.N.J. 1991). Indeed,

> [t]he story in this complaint is familiar in securities litigation. At one time the firm bathes itself in a favorable light. Later the firm discloses that things are less rosy. The plaintiff contends that the difference must be attributable to fraud. "Must be" is the critical phrase, for the complaint offers no information other than the differences between the two statements of the firm's condition. Because only a fraction of financial determinations reflects fraud, plaintiffs may not proffer the different financial statements and rest. Investors must point to some facts suggesting that the difference is attributable to fraud.

DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir.), cert. denied, 111 S. Ct. 347 (1990). In the case at bar, "defendants anticipated profits, not losses. It is true that defendants' roseate economic anticipations were doomed, but economic

prognostication, though faulty, does not, without more, amount to fraud." Polin, 552 F.2d at 805. In short, fraud by hindsight is not an actionable claim. See Schwartz v. Novo Industri A/S, 658 F. Supp. 795, 799 (S.D.N.Y.1987) ("[p]laintiff fails to offer a single objective fact to suggest that the prediction was other than an honestly held view.... the complaint is an example of alleging 'fraud by hindsight' and therefore not actionable under § 10b and Rule 10b-5").

Moreover, the prospectus gave fair warning that the success of the Taj and the partnership's ability to service the debt on the bonds depended entirely on numerous future conditions and occurrences, many of them out of defendants' control. Thus, the prohibition against fraud by hindsight

claims and the "bespeaks caution" doctrine go hand in hand.

Plaintiffs have relied heavily, almost exclusively, on the allegation that there was no reasonable basis for the statement that "[t]he Partnership believes that funds generated from the operation of the Taj Mahal will be sufficient to cover all of its debt service (interest and principal)." Considerations of cautionary language aside, a claim based solely on this statement simply is not actionable, for it alleges nothing more than fraud byhindsight. The Taj was not ultimately able to generate funds sufficient to cover all of its debt service, and plaintiffs have cried "fraud" as a salve to their disappointment in a failed investment. However, failure of an investment is not intrinsically equatable

with fraud in the offering of that investment. Such an equation is the very essence of fraud by hindsight.

The complaint itself dictates this interpretation of plaintiffs' claim. Plaintiffs' allegation of "no reasonable basis" is a naked assertion unsupported by any factual allegations in the complaint. Plaintiffs provide no foundation for their assertion that defendants either had no reasonable basisfor its belief, or that defendants did not in fact hold that belief. While we are instructed to draw all reasonable inferences in favor of a complainant, we concur with the reasoning in DiLeo, that no reasonable inferences of fraud can be drawn from conclusory allegations devoid of factual basis.

Plaintiffs must show "objective evidence" that the challenged statement

represents a dishonestly held belief, or a belief without reasonable basis. For example, in Sinay, "the plaintiffs did not offer any objective evidence that the statements were anything other than honestly held convictions based on the historical information which Lamson possessed." Sinay, 948 F.2d at 1040. That is virtually the same situation as is presented by the complaint now under review. In Sinay the district court dismissed the complaint pursuant to Rule 12(b)(6), and that dismissal was affirmed. Dismissal is appropriate on these grounds here as well.

D. Further Considerations Regarding the Ability to Service Debt on the Bonds Claim

In addition to the "no reasonable basis" allegation, the complaint lists five related "failures to disclose" which purport to allege factual omissions in

the prospectus.[10] None can withstand the scrutiny of either the "bespeaks caution" inquiry, or the analysis employed in determining whether a complaint states a claim upon which relief may be granted. First, a federal securities fraud suit is not a game of "edit to win." It is neither the right nor the responsibility of investors, disgruntled or otherwise, to draft the prospectus themselves from the position of hindsight. It is management's responsibility to draft a prospectus which makes full disclosure. Bespeaking

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10. For example, plaintiffs claim that the prospectus "failed to disclose that the Taj Mahal would require an unprecedented 'casino win' of approximately $1.3 million per day on a continuing basis to meet its enormous debtload," failed to disclose that "a leading analyst of the casino industry" had warned Donald Trump that the Taj probably could not meet its debt service, and "omitted to state" that such a large casino win was approximately five times the average casino win for other Atlantic City casinos.

caution is an essential part of such disclosure, particularly regarding futureprojections. Plaintiffs cannot state a claim based on how, in retrospect, they would have preferred the cautionary language to be drafted. Nor are there any factual allegations in the complaint going to show that these omissions or failures to disclose were fraudulent.

Plaintiffs also allege that the prospectus "omitted to state, as required by Item 303 of Regulation S-K, that there existed 'known ... uncertainties' regarding whether operation of the Taj Mahal would generate sufficient funds to cover all of its debt service...." It is beyond this court's ken how plaintiffs could support such an allegation, considering the repeated warnings in the prospectus that there most definitely

were "uncertainties" as to the ability of the Taj partnership to cover its debt service. For example, the prospectus clearly stated that there was no history of earnings at the Taj; that operations at the Taj would be "subject to all of the risks inherent in the establishment of a new business enterprise;" that the ability of the partnership to service its debt was "completely dependent" on many diverse factors, some not even within the partnership's control; and that "no assurance can be given that, once opened, the Taj Mahal will be profitable or that it will generate cash flow sufficient to provide for the payment of the debt service on the Note and/or any future borrowings by the Partnership." Given this language, which we think unquestionably bespeaks caution, we fail to see how plaintiffs could succeed in

convincing a reasonable jury that the prospectus "omitted to state" uncertainties regarding the partnership's ability to generate funds sufficient to cover all of its debt service.

E. The Taj Funding Claim

We note here a related allegation of plaintiffs, the claim that the prospectus failed to disclose that operation of the Taj involved an "excessive, unwarranted, and unprecedented debt component relative to total capitalization. Out of the $805 million total projected cost for acquisition, construction, initial financing and related costs, no more than $75 million (or only nine percent) represented capital contributions." Complaint, ¶ 36. This allegation also charges that the prospectus failed to disclose that "no other Atlantic City casino project was so thinly capitalized

and, therefore, so vulnerable to downturns in the industry and economic downturns generally." We must therefore examine the language in the prospectus regarding the financing structure of the Taj.

In the "Special Considerations" sub-section entitled "The Financing," theprospectus states that "Approximately $805,000,000 will be required to (i) fundamounts needed to complete construction of and open the Taj Mahal ... (ii) repay all indebtedness incurred in financing the cost of and to pay certain assumed liabilities with respect to, the acquisition of the Property ..., and (iii) pay related expenses expected to be incurred...." Prospectus at 24. Beneath that appears the following chart:

Sources of Funds

(1)	Gross proceeds of the Bonds	$675,000,000
(2)	Capital contribution	75,000,000
(3)	Other sources	55,000,000
	Total	$805,000,000

Footnote (2) states that the $75,000,000 capital contribution is to "be contributed to the Partnership by Donald J. Trump upon issuance of the Bonds."

In light of this disclosure, plaintiffs cannot state a securities fraud claim based upon an allegation that the prospectus failed to disclose the debt component ratio. Such an allegation is patently false.

However, all reasonable inferences must be drawn from the complaint. It is perhaps reasonable to infer that plaintiffs claim, not that the prospectusfailed to set forth the actual

numbers, but that defendants failed to characterize those numbers as "excessive," "unprecedented," "unwarranted" and "thinly capitalized ... [relative to] other Atlantic City casino project[s]." However, given this inference, plaintiffs still cannot successfully state a securities fraud claim. A prospectus, while required to "bespeak caution," is not required to apply pejorative or derogatory descriptors to the investment it is selling. See, e.g., Goldberg v. Meridor, 567 F.2d 209, 218 n. 8 (2d Cir.1977) (Section 10b and Rule 10b-5 do not require characterizations of transactions "with pejorative nouns or adjectives"), cert. denied, 434 U.S. 1069, 98 S.Ct. 1249, 55 L.Ed.2d 771 (1978); O'Brien v. National Property Analysts Partners, 719 F.Supp. 222, 228 (S.D.N.Y.1989) (claim

that defendants failed to characterize fees and expenses of transaction as "excessive" not actionable; such a claim "admitt[ed] that the amount of fees and expenses was disclosed"); Valente v. PepsiCo, Inc., 454 F.Supp. 1228, 1253 (D.Del.1978) (citing Goldberg v. Meridor). Accordingly, this allegation would not be actionable under federal securities laws simply for lacking descriptors such as "excessive" and "unwarranted." Nor is there any legal obligation for management to compare itself, unfavorably or otherwise, to industry competitors. Comparison shopping is the responsibility of the reasonable investor.

This brings us to the end of plaintiffs' claim that the disclosures in the prospectus regarding management's ability to service the debt on the bonds

were false, misleading and fraudulent. Plaintiffs cannot state a claim for whichrelief could be granted, and accordingly this part of the complaint is dismissed.

VI. Plaintiffs' Second Claim-Competition

Next, plaintiffs allege that the prospectus failed to adequately disclose the risks to the Taj's success posed by competition in the casino industry. Accordingly, we first examine the statements in the prospectus dealing with such competition.

A. The Prospectus

The risks of competition are first raised in the "Special Considerations" sub-section entitled "Competition." It is worth excerpting here the entire contents of that sub-section:

> **Competition in the Atlantic City casino/hotel market is intense**. At present, there are twelve casino/hotels in Atlantic City,

including Trump Castle Hotel & Casino (which is currently undergoing an expansion program) and Trump Plaza Hotel and Casino (which is currently undergoing an extensive refurbishment and renovation program). See "Potential Conflicts of Interest" above. Some Atlantic City casino/hotels recently have completed renovations or are in the process of expanding and improving their facilities. In September 1988, a casino/hotel added 30,000 square feet to its casino floor space and 507 rooms to its hotel capacity. Moreover, another casino/hotel has begun constructing a new hotel tower with approximately 800 rooms, which is scheduled to open in 1989 and which will permit the casino/hotel to add up to 60,000 square feet to its casino floor space. Preliminary plans have been announced for the construction of a new casino/hotel which, if constructed, is expected to open by 1991 and to have approximately 60,000 square feet of casino floor space. Preliminary plans also exist for the construction of two additional casino/hotels, each with approximately 600 hotel rooms and 60,000 square feet of casino floor space, neither of which, if constructed, is expected to open before 1992. In addition, both the Resorts Casino Hotel, which is expected to be renovated, and the Showboat Casino and Hotel ("Showboat") are situated next to the Taj Mahal and will each be connected to the Taj Mahal by an

> elevated pedestrian walkway. **The Partnership believes that, based upon historical trends, casino win per square foot of casino space will decline in 1990 as a result of a projected increase in casino floor space, including the opening of the Taj Mahal.**

Prospectus at 14 (emphasis added).

Additionally, under "Potential Conflicts of Interest" in "Special Considerations," the prospectus states that "[t]he Trump Casinos compete directly with each other and with other Atlantic City casino/hotels and will compete with the Taj Mahal for casino, hotel and restaurant customers and for convention business." Prospectus at 14.

Considerations of competition in the casino/hotel industry are revisited in the "Management's Discussion" section of the prospectus. In addition to repeating that "[c]ompetition in the Atlantic City casino/hotel market is intense," this section notes that the "Atlantic City

Casino industry is currently experiencing a significant increase in capacity, which is generally measured by available casino floor space." Prospectus at 33. After again detailing the various current and anticipated expansions, renovations and future construction in the area, the section continues:

> The Taj Mahal would also compete with any casinos in jurisdictions close to New Jersey that may authorize casino gaming in the future. Legislation permitting casino gaming has been proposed, from time to time, in various states. The Partnership also faces competition from casinos located in Nevada, Puerto Rico, the Caribbean and The Bahamas, as well as from other forms of legalized gaming in New Jersey and its surrounding states such as lotteries, horse racing, jai alai and dog racing.
>
> . . . . .
>
> The Partnership believes that, based upon historical trends, casino win per square foot of casino space will decline in 1990 as a result of a projected increase in casino floor space, including the opening of the Taj Mahal. **Growth in Atlantic City win is expected to be restrained**

until further improvements to the City's transportation system and infrastructure are undertaken and completed and the number of non-casino hotel rooms and existing convention space are increased. **No assurance can be given with respect to either the future growth of the Atlantic City gaming market or the ability of the Taj Mahal to attract a representative share of that market. The profitability of the Taj Mahal could be affected by its proximity to theResorts Casino Hotel, which is being acquired by Griffin Co., and the Showboat,** which is owned and operated by an entity not affiliated with the Partnership....

The Taj Mahal, Resorts Casino Hotel and Showboat are located at the eastern end of the Boardwalk, approximately one-half mile to one and one-half miles to the east of eight other Atlantic City casino/hotels. **The effect of the concentration of the majority of the casino/hotels at the opposite end of the Boardwalk has historically been to attract the gaming patron volume to that area and away from the eastern end of the Boardwalk, where the Taj Mahal will be located. The Partnership believes that the opening of the Taj Mahal and the proximity of the Showboat and Resorts Casino Hotel will attract an increased volume of patrons to the vicinity of the Taj Mahal.**

> Casinos in Atlantic City must be located in approved hotel facilities which offer dining, entertainment and other guest facilities. Competition among casino/hotels is intense and is based primarily upon promotional allowances; advertising; the attractiveness of the casino area; service; quality and price of rooms, food and beverages; restaurant, convention and parking facilities; and entertainment. **In order to compete effectively with all other Atlantic City casino/hotels, the Partnership intends to offer complimentary drinks, meals, room accommodations and/or travel arrangements to its preferred customers, as well as cash bonuses and other incentives pursuant to approved bus coupon programs.**

Prospectus at 34 (emphasis added).

B. Application of the "Bespeaks Caution" Approach

We begin by commenting on the volume and degree of cautionary language regarding competition. Here again, the prospectus virtually bristles with warnings. And, these warnings are specifically tailored to the purported misrepresentations and omissions.

Plaintiffs base their allegation of a cover-up of competitive risks on the prospectus statement that the partnership "believes that the opening of the Taj Mahal in the proximity of the Showboat and Resorts Casino Hotel will attract an increased volume of patrons to the vicinity of the Taj Mahal." According to the complaint, this statement violates federal securities fraud laws because it "fails to address the fact that drawing gambling dollars from one casino to another would fail to materially increase the casino win for Taj Mahal on average." Plaintiffs claim that this was materially misleading. However, the prospectus in fact admits that casino wins are expected to decrease in at least the near future, and deliberately offers no assurances of increases in casino wins. Moreover, the challenged statement does not say that

the Taj will draw more gaming patrons away from Showboat and Resorts, but merely that the clustering of the three casinos together at that end of the boardwalk could attract more patrons to the vicinity of the Taj.

The complaint continues, "[i]n fact, it would cost more money to attract gamblers from one casino to another than would be earned by any increase in business, thereby not increasing the casino win, but rather decreasing it." Again, plaintiffs disregard the very language of the prospectus they seek to challenge. Noting for a third time that competition in the Atlantic City casino industry is intense, the prospectus warns that success is predicated on all sorts of promotional and advertising incentives; and sets forth some of the tactics the Taj will have to employ in

order to compete effectively. These include complimentary drinks, meals, room accommodations and travel arrangements for preferred customers. Surely this indicates that effective competition will cost money. As in I. Meyer Pincus, here "the prospectus states exactly the 'fact' that [plaintiff] contends has been covered up...." I. Meyer Pincus, 936 F.2d at 762.

Plaintiffs also attack the competition disclosures of the prospectus from another angle. They claim that the statement about attracting more patrons to the vicinity of the Taj, Showboat and Resorts was materially misleading because it "failed to disclose the material fact that the opening of the Taj Mahal in the proximity of the Showboat, Trump Castle, Trump Plaza, and Resorts Casino Hotel would materially increase the risk that

either the Castle, the Plaza or the Taj Mahal would fail or be unable to service its debt." This failure would allegedly "tarnish" Donald Trump's name and business reputation, further harming the Taj, according to plaintiffs. Complaint, ¶ 38.

This claim also is not actionable. The prospectus warns of the existence of competition among Donald Trump's various casino holdings in Atlantic City:

"[t]he Trump Casinos compete directly with each other and with other Atlantic City casino/hotels and will compete with the Taj Mahal for casino, hotel and restaurant customers and for convention business." Therefore, plaintiffs could not establish that the prospectus was fraudulent in failing to disclose the existence of competition among defendant Trump's casinos. Again, the prospectus

states the very fact which plaintiffs contend has been omitted. We cannot imagine any language which would more effectively bespeak caution and provide investors with all the information they need to make an independent, reasoned business judgment of their own.

Plaintiffs also claim the prospectus was misleading about competition by alleging that the prospectus "also omitted to disclose the likely effect of the already weakened economy in the Northeast and the potential for competition from casinos located in Las Vegas, Nevada, principally the Mirage, then under construction." Complaint, ¶ 39. Because the prospectus in fact states that "[t]he Partnership also faces competition from casinos located in Nevada, Puerto Rico, the Caribbean and The Bahamas," we find that plaintiffs

could not recover on an alleged failure to disclose risks of competition from Las Vegas casinos. This is precisely the sort of claim to which the "bespeaks caution" doctrine addresses itself. Yet again, the prospectus states exactly the fact that plaintiffs contend was covered up.

With respect to the claim that the prospectus omitted to disclose the "already weakened economy in the Northeast," we make two comments. First, the prospectus makes numerous references to the possible ways in which the generalstate of the economy will affect the success of the Taj and the corresponding ability of the partnership to successfully compete as well as service the debt on the bonds. Thus, "the documents unquestionably warned potential investors in a meaningful way

that economic conditions in the [ ] industry were uncertain." Romani, 929 F.2d at 879 (emphasis added). This renders plaintiffs' allegation not actionable.

Second, there is no obligation under the securities laws for an offering document to set forth information which is widely available to the public and which a reasonable investor ought to be held accountable for knowing. See, e.g., Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1041 (6th Cir.1991) ("[n]ews of the labor problems was widely disseminated in the media, locally ... and nationally. There was no duty to divulge anything more for the public about the labor difficulties.") There can be no clearer example of such information than the general state of the economy, particularly a widely-reported

recessionary downturn. For this reason as well, this claim is not actionable.

Finally, the complaint makes the bewildering allegation that "[t]he Prospectus in general de-emphasized the business risks involved in operating the Taj Mahal." Complaint, ¶ 39. Considering all the quoted portions of the prospectus so far included in our opinion, this allegation is indeed the sort for which a motion to dismiss is most fitting.

We find that the prospectus' entire treatment of competition "bespeaks caution" to a striking degree. In the competition claim as well as in the ability to service the debt claim, plaintiffs have attempted to make out a sustainable federal securities fraud case by extracting a single sentence from the entire body of the prospectus, regardless

of all other language related to that sentence. Under such circumstances dismissal is required, for even given the most generous reading of their complaint plaintiffs could not recover as a matter of law. Read in context, as it must be, the challenged statement regarding competition is not misleading as a matter of law, and therefore is not actionable. This claim will be dismissed.

VII. Plaintiffs' Third Claim-Appraisals

Next, plaintiffs challenge the treatment of appraisals of the Taj's value in the prospectus. The prospectus referenced three appraisals of the worth of the Taj. Two of these appraisals, the AGI Current Appraisal and the MGA Current Appraisal, estimated the current worth of the Taj at the time of the bond offering. The complaint does not attack the AGI Current Appraisal and the MGA Current

Appraisal. The third appraisal, called the AGI Report, was an estimate or forecast of the future worth of the Taj. The complaint alleges there was inadequate basis for management's reliance on the appraised value of the Taj "as of its opening date in late 1989 or early 1990." We may reasonably infer from this that the allegation is limited to the appraisal of future worth, the AGI Report. The complaint further alleges that while this appraisal was based primarily on the capitalization of income approach, "it was impossible to make any reasonable estimate of the Taj Mahal's future income."

A. The Prospectus

The "Appraisals" aspect of the "Special Considerations" section contains the following language:

> In connection with the acquisition of the Property and the offering of

> the Bonds, The Trump Organization obtained appraisals from Appraisal Group International ("AGI") and Martin Gross Associates ("MGA"), independent MAI appraisers, reflecting the current market value of the Property.... The Trump Organization also obtained a report from AGI ("the AGI Report") which states that the appraised market value of the Property, as of December 1, 1989, on the assumption, among other things, that the Taj Mahal is fully completed and open to the public as an operating casino/hotel on or about December 1, 1989 is $1,100,000,000.
>
> ....
>
> **Appraisals are estimates or opinions of value and cannot be relied upon as precise measures of value or worth. In addition, the appraisal in the AGI Report is an estimate of the market value of the Taj Mahal at a future date. The amount that the Partnership might realize from the sale of the Property may be more or less than its appraised market value, depending on its then current and anticipated uses, and zoning, financial, economic, market and other conditions that may affect a property's value. Moreover, the appraised market value does not reflect what might be realized upon liquidation of the Taj Mahal or the sale of the Taj Mahal in a distress sale.**

Prospectus at 17 (emphasis added).

Appraisals are revisited in "Management's Discussion." In the section entitled "Properties of the Partnership," there is a sub-section specifically dealing with appraisals. It again describes the three appraisals, and repeats verbatim the cautionary language that appraisals "are estimates or opinions." Prospectus at 39. Additionally, the prospectus states that "[i]n the opinion of the appraisers, the appraisals, which are subject to certain assumptions and qualifications, were prepared in conformity with the guidelines regarding appraisal procedures set forth in regulations governing Federal savings institutions." Prospectus at 39. The appraisers "employed three recognized methods of valuation ..., the cost approach, the comparable sales approach, and the

capitalization of income approach, [but] gave primary importance to the capitalization of income approach." Prospectus at 40, 41. And it was again noted that the future appraisal, the AGI Report, "is an estimate of the market value of the Taj Mahal as of a future date and there can be no assurance that the Taj Mahal could be sold at any time, in a foreclosure sale or otherwise, for an amount equal to or exceeding its then appraised value." Prospectus at 41.

B. Application of the "Bespeaks Caution" Approach

Our analysis here mirrors the analysis undertaken regarding plaintiffs' other claims. First, we find that the citations in the prospectus to the AGI Report bespeak caution in a prominent, specific way. The very text of the prospectus again supports this finding. Next, we recall that "[e]conomic

projections are not actionable if they bespeak caution." Sinay, 948 F.2d at 1040. Accordingly, plaintiffs claims to the extent they are based on management's reliance on the AGI Report are not actionable.

This claim appears to be yet another attempt to hold defendants liable for fraud by hindsight. "In essence [plaintiff] speculates that defendants committed fraud based solely on the partnership's failure to be as profitableas the offering materials indicated was possible." Romani, 929 F.2d at 880. However, as previously discussed, fraud by hindsight is not actionable under federal securities laws. Nor have plaintiffs provided any factual basis for their allegation that there was no reasonable basis for the AGI Report's conclusion that the Taj could at a future

date be worth $1.1 billion. As we noted earlier, no inference of fraud can be drawn from conclusory allegations devoid of factual basis. See DiLeo, supra. Therefore, this claim will be dismissed.

VIII. Plaintiffs' Fourth Claim-Donald Trump's Financial Status and His Obligations to the Bondholders

The complaint alleges that false and misleading omissions and statements with respect to defendant Donald Trump's financial status and obligations appeared in two forums: the prospectus, and also various media news sources. These present different issues we will treat seriatim.

The crux of plaintiffs' claim here is that both the prospectus and the statements reported in the media failed to disclose that Donald Trump's financial condition was less than stable, and omitted to state that the Taj would

suffer and be incapable of servicing the debt on the bonds if his financial condition or reputation were "tarnished." The complaint also alleges that the prospectus failed to disclose the capital contribution Donald Trump was obligated to make to the Taj funding plan, and that the amount of his contribution left the Taj heavily leveraged.

A. The Prospectus

In the "Special Considerations" sub-section entitled "Trump Completion Guaranty," the prospectus notes that while "Donald J. Trump will covenant, agree and guarantee that the construction of the Taj Mahal will be substantially completed by March 1, 1991, ... Donald J. Trump will not, under any circumstances, be obligated under the Trump Completion Guaranty or the Trump Line of Credit to pay the principal of, premium, if any, or

interest on the Bonds...." Prospectus at 13.

In the "Management's Discussion" portion of the prospectus, it is stated:

> Donald J. Trump has advised the Partnership and the Company that he has sufficient financial resources to perform his obligations under the Trump Completion Guaranty. He has further advised the Partnership and the Company that his net worth, determined in accordance with generally accepted accounting principles applicable to personal financial statements, is at least $500,000,000. In computing such net worth, assets and liabilities are stated at their estimated current values and amounts. Depending upon the circumstances under which assets are liquidated, Donald J. Trump may or may not be able to realize the fair market value of such assets. A substantial portion of Donald J. Trump's assets consist of real property or interests in regulated enterprises, which may affect the liquidity of such assets.

Prospectus at 68.

B. Application of the "Bespeaks Caution" Approach and Other Considerations

Plaintiffs allege that the prospectus did not disclose that Donald Trump intended to or was spending millions of dollars on ventures other than the Taj; and that this was misleading because it failed to inform investors that his financial condition was shaky, and that this could harm the Taj. However, we are constrained to point out that Donald Trump's obligations under the Taj financing deal were unequivocally set forth in the prospectus. His capital contribution obligation was limited to a $75 million amount. The prospectus stated that Donald Trump could make good on this obligation, and he in fact did so. Plaintiffs do not allege, nor could they allege, that he did not make the $75 million contribution. How Donald Trump expended his own funds above and beyond

the $75 million was irrelevant to the Taj deal. As the very language of the prospectus makes explicit, he was not a personal guarantor of the Taj's success. Accordingly there was no requirement to disclose information as to how he would manage that portion of his net worth in excess of the $75 million capital contribution. Indeed, we can discern no requirement for the disclosure of his precise personal net worth at all, other than perhaps to further assure bondholders he could perform his obligations to the partnership.

Furthermore, as a matter of law, this claim is too attenuated to be actionable. The connections which plaintiffs seek to draw are beyond the bounds of management's responsibility to disclose. The "undisclosed fact" that any tarnish to Donald Trump's financial

reputation could be reflected in the prosperity of the Taj is in reality an inference which any reasonable investor, given the disclosures made in the prospectus and the well-known, widely-reported public prominence of Donald Trump, could have made independently. The disclosure requirements of section 11 and 10b do notanticipate a duty by management to draw inferences for investors. Again, the object of the securities fraud laws is disclosure, not business judgment. Business judgment, including inferences drawn from fully-disclosed information, rightly remains the province of individual investors.

Prominent and specific information in the prospectus also renders not actionable plaintiffs' spurious allegation that Donald Trump's guarantee

of $75 million "indicated greater leverage on the Taj Mahal than investors and the Purchaser Class were led to expect from the Prospectus." As discussed supra, in connection with plaintiffs' Taj funding claim, the prospectus set forth the entire financing structure of the Taj, including Donald Trump's capital contribution. Bond purchasers knew that the bonds were worth $675 million, and that the total capital contribution was far less than that amount. The prospectus thus set forth the very fact which plaintiffs' allege was covered up, the degree to which the Taj was leveraged. This is indeed beyond the bounds of bespeaking caution.

Finally, the allegation that the prospectus disclosure of Donald Trump's net worth as $500,000,000 was false and misleading is also not actionable.

Although plaintiffs state in their complaint that the net worth was based on artificially inflated appraisals and the financial statements relied upon were not prepared in accordance with generally accepted accounting principles, there is again no factual basis for these claims. See DiLeo, supra. And in any event, the complaint bespeaks caution in the manner in which it presents the net worth appraisal: it warns that the net worth is based on estimated values of assets, which may not be realized in the event ofliquidation at some future date. Thus, the disclosure about Donald Trump's net worth, which is notably nothing more than another future projection, is directly addressed by narrowly-tailored cautionary language. Plaintiffs could not recover on this claim, and therefore it must be dismissed.

C. The Statements Reported in the Media

The complaint cites various media sources, such as the Wall Street Journal, Newsweek and Forbes, alleging that certain statements reported in these sources form the basis for a federal securities fraud claim.[11] In the statements at issue, Donald Trump reportedly remarked, inter alia, that theTaj would be a tremendous success, that his net worth was four or five billion dollars, that he wanted to become the "king of cash," and that he denied having cash flow problems. Plaintiffs argue that these statements are actionable. We disagree.

Defendants argue several bases for dismissing this claim. However, we need only remark that every statement listed

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11. Plaintiffs did not attach to the complaint copies of the articles from which they quoted.

in the complaint was made, according to the dates given by plaintiffs themselves, during 1989 and 1990. The bonds were issued in 1988, and plaintiffs admittedly purchased their bonds before 1989. Plaintiffs cannot rely on statements made subsequent to their purchases in order to state a securities fraud claim, because plaintiffs could not have relied on the statements in making their purchases in the first place. See Schwartz v. Novo Industri A/S, 658 F.Supp. at 795. "[N]o liability attaches to statements made after the transaction [and t]herefore [plaintiff's] allegations regarding after-made statements do not state a claim." Stevens v. Equidyne Extractive Industries, 694 F.Supp. 1057, 1064 (S.D.N.Y.1988).

Plaintiffs respond that they represent a putative class, potential

members of which may have purchased bonds subsequent to, and in reliance on, these statements. This response fails to persuade us. The named plaintiffs could not represent a class which included bondholders who purchased after these statements were printed, as all of the named plaintiffs purchased prior to circulation of those statements. Thus the named plaintiffs here would not be "similarly situated" to such potential class members, and could not adequately represent their interests. "The fact that a case is brought as a class action does not change the calculus; named plaintiffs 'cannot represent a class of whom they are not a part.'" Haft v. Eastland Financial Corp., 772 F.Supp. 1315, 1316 (D.R.I.1991) (citations omitted). Accordingly, plaintiffs cannot state a claim upon which relief could be

granted based on these media statements, and the claim must therefore be dismissed.

This disposes of all plaintiffs' substantive claims for relief in the complaint. Because no claim is actionable, for the reasons set forth herein, the federal securities fraud claims will be dismissed in their entirety.

IX. Plaintiffs' Request to Amend the Complaint

In defending against this motion to dismiss, plaintiffs have supplied this court with numerous materials outside the pleadings. One of these is a document entitled the "Laventhol Report," a future appraisal of the Taj which is not referenced in the prospectus. We have held that these materials, including the Laventhol Report, are not to be

considered as part of this motion to dismiss.

However, plaintiffs have requested leave to amend their complaint as an alternative to dismissal.[12] While leave to amend is generally to be liberally granted, see Pancza v. Remco Baby, Inc., 761 F.Supp. 1164 (D.N.J.1991), it should not be granted if such an amendment would be futile. See Sinay, 948 F.2d at

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12. In fact, plaintiffs have not complied with our local rules concerning motions for leave to amend a complaint. Plaintiffs have merely noted in their opposition brief their opinion that "[e]ven if the Complaint is held to be defective, any defects can be easily remedied," and cited in a footnote to the proposition that leave to amend a complaint is to be freely given pursuant to Fed.R.Civ.P. 15(a). However, New Jersey Federal Practice Rule 12 H provides that a motion to amend is to be filed, together with "a copy of the proposed pleading or amendments...." Plaintiffs neither filed a motion, nor attached to their brief any proposed amendment, thus leaving us without guidance as to how they would amend their complaint if granted leave. Despite the procedural irregularities, in the interests of justice we will consider plaintiffs' request as a formal motion to amend. This requires us to extrapolate from plaintiffs' submissions the substance of any amendment to their complaint.

1041-42; Massarsky v. General Motors Corp., 706 F.2d 111, 125 (3d Cir.), cert. denied, 464 U.S. 937, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983). That is to say, if the amendment could not survive a motion to dismiss, then leave to amend will not be granted. Accordingly, in considering plaintiffs' request for leave to amend, we must also consider the additional materials they have submitted, on the assumption that these materials would be the basis of any proposed amendment.[13]

Of particular import in this case is the restriction that "[a]mendments

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13. In fact, at oral argument counsel for plaintiffs effectively withdrew any request for amendment, stating that the complaint could stand on its own as is, without any need for revision. It is well settled that it is not an abuse of discretion for a district court to refuse to grant amendment where amendment is not sought. See, e.g., Romani, 929 F.2d at 880-881. However, in the face of conflicting messages from plaintiffs and the submission of additional materials, and adhering to our duty to draw all reasonable inferences in plaintiffs' favor, we will consider amending the complaint.

relating to projections or expectations offered to induce investments must allege particular facts demonstrating the knowledge of defendants at the time that such statements were made." Luce, 802 F.2d at 57. We examine plaintiffs' submissions in light of this standard.

First and foremost is the Laventhol Report. Prepared by the accounting firm of Laventhol and Horwath in 1987, the Laventhol Report was commissioned by Resorts International, Inc., the original developer of the Taj project. It was issued in September 1987, prior to commencement of the deal which transferred ownership of the Taj to Trump. The following language was included in the introductory letter to the report: "Our report is intended solely for the information of the officers, directors and shareholders of

Resorts International, Inc. and, if desired, the Casino Control Commission ofNew Jersey. Otherwise, neither this report nor its comments may be referred to or quoted in any registration statement, prospectus, ... or document without our prior written consent." Plaintiffs' Exhibit A at 2.

The Laventhol Report's projections of future income and cash flow for the Taj Mahal differ markedly from the AGI Report projections included in the prospectus. Indeed, the Laventhol Report projections, as it has turned out, mirror more accurately the actual economic performance of the Taj. However, these points cannot in themselves serve as the basis of an amended complaint which could survive another 12(b)(6) motion. First, the Laventhol Report is at most independent evidence that might tend to

show that the AGI Report referenced in the prospectus was false and misleading. But it is not factual support for the allegation that there was no reasonable basis for reliance on the AGI Report. Furthermore, defendants were under no obligation to include the Laventhol Report projections in the prospectus. Management is not required by the securities fraud laws to disclose other companies' papers. Compliance with the disclosure requirements, if such a burden were imposed, would border on the impossible.

Neither were defendants authorized to include the Laventhol Report in the prospectus, as evidenced by the restrictions indicated on the face of thereport itself. And, this is assuming that defendants even had knowledge of theLaventhol Report when preparing the

prospectus, as it was prepared solely forResorts. In short, the Laventhol Report was neither prepared for use in a prospectus, nor authorized for reference in a prospectus, nor commissioned by defendants, nor even commissioned by Resorts with the sale to Trump in mind.

Moreover, the cover letter to the Laventhol Report stated that the report relied on assumptions, some of which "inevitably will not materialize, and unanticipated events and circumstances may occur; therefore, any actual results achieved during the period of the prospective analyses will vary from the estimates, and the variations may be material." Plaintiffs' Exhibit A at 2. This kind of qualification is substantively no different from the sort of cautionary language which appeared in the prospectus regarding the AGI Report.

Indeed, plaintiffs own complaint indicates that the Laventhol Report could not correct the deficiencies we have highlighted in this opinion. Plaintiffs claim that at the time the prospectus was filed, "it was impossible to make any reasonable estimate of the Taj Mahal's future income." How, then, can the Laventhol Report have been a reasonable estimate of future worth any more than the attacked AGI Report? It is clear that introduction of the Laventhol Reportinto the complaint would do nothing more than attempt to establish, yet again, fraud by hindsight. For the reasons discussed supra, such a claim is not actionable.

Finally, the Laventhol Report itself, even without the defects we have listed here, is insufficient to support a securities fraud claim. Were the

complaint amended to include the Laventhol Report, still it would "offer[ ] no information other than the differences between the two statements of the firm's condition. Because only a fraction of financial determinations reflects fraud, plaintiffs may not proffer the different financial statements and rest. Investors must point to some facts suggesting that the difference is attributable to fraud." DiLeo, 901 F.2d at 627. We are faced with yet another example of fraud by hindsight rearing its ugly head. Thus, and for all the reasons enumerated here, no amendment based on the Laventhol Report could survive dismissal.

Plaintiffs' remaining submissions require only cursory comment. An affidavit by Peter R. Tyson, of Laventhol and Horwath, testifies that the Laventhol

Report was commissioned by Resorts "because they were mapping corporate strategy." Plaintiffs' Exhibit C at 3. This in fact corroborates our view that defendants had no obligation to rely on projections solicited by another corporate entity for entirely different purposes in the past. The affidavit also attempts to gloss over the use which plaintiffs seek to make of the Laventhol Report: one of the scenarios anticipated in the report envisioned Resorts continuing to operate the Taj while selling off Resorts International Casino and Hotel to other management, and plaintiffs argue that this situation happened "in reverse," with the Taj instead being sold off and operated by the Trump defendants. However, this also corroborates defendants' fraud by hindsight defense, for if the Laventhol

Report stated it was speculative how the Taj would perform under Resorts' management, it was even more speculative how it would perform under other management, whether defendants or any other potential buyer.

Another document, a deposition transcript which purports to speak to Merrill Lynch's due diligence as the underwriter, is irrelevant, as we have not had to reach that issue in dismissing the complaint. The remaining documents similarly do not contain facts demonstrating the knowledge of defendants at the time the alleged misrepresentations were made, or anything which could alter our conclusions reached in this opinion.

Accordingly, plaintiffs' questionable request to amend is denied,

and our dismissal of the complaint is with prejudice.

X. Pendent State Law Claims

Because plaintiffs' federal claims will be dismissed in their entirety, we cannot retain jurisdiction over the pendent state law claims. United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Accordingly, the pendent claims for breach of fiduciary duty and false advertising will be dismissed without prejudice.

XI. Conclusion

Our ruling here is based on our belief that plaintiffs should not be permitted to distort the plain meaning of the prospectus in order to state a claim, or to rely on isolated statements buried in the midst of the document while overlooking prominent, conspicuous warnings at the beginning of the document

as well as immediately surrounding the challenged statements. Neither can plaintiffs base a securities fraud claim on an attempt to "rewrite" the prospectus in order to phrase the cautionary language in terms they find more suitable but without any practical difference in effect, nor on allegations of fraud by hindsight, nor on allegations of securities fraud devoid of factual basis. Because these very defects represent the essence of plaintiffs' complaint, and because they are not amenable to correction by an amendment, the complaint is dismissed with prejudice.[14]

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14. Finally, we feel obliged to note the pendancy of a motion to disqualify plaintiffs' co-lead counsel, Richard Greenfield, as class counsel, and his client, Fairmount, as a class representative. The basis of this motion to disqualify is Mr. Greenfields and Fairmount's alleged conflicts of interest between this litigation and litigation involving Trump's Castle Casino & Hotel and Trump's Plaza Casino & Hotel. The motion to disqualify in no way impacts upon this motion to dismiss. The presence or absence

An appropriate order will be entered.

ORDER

This matter having come before the court upon motion of defendants Donald J. Trump, Robert S. Trump, Harvey S. Freeman, The Trump Organization, Inc., Taj Mahal Funding, Inc., Trump Taj Mahal Inc. and Trump Taj Mahal Associates Limited (collectively "the Trump defendants"), and of defendant Merrill, Lynch, Pierce, Fenner & Smith for dismissal pursuant to Fed.R.Civ.P. 12(b)(6), and the court having considered the submissions, and for good cause shown;

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of either Mr. Greenfield or Fairmount does not alter in any way the substantive and controlling issues which dictate the result reached here.

It is, this 2nd day of June, 1992, hereby ORDERED that defendants' motion is GRANTED, and the complaint is hereby DISMISSED with prejudice.